No. 93-1170-CFX
Status: GRANTED

Title: United States, et al., Petitioners
v.
National Treasury Employees Union, et al.

Docketed:
January 19, 1994

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Vanderstar,John, Roth,Mark D., Stern,Kenneth P., O'Duden,Gregory

12-10-93 ext til 1-19-94, C.J., CITED. Opinion amended 4-8-93.

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1993	G	Application (A93-475) to extend the time to file a petition for a writ of certiorari from December 20, 1993 to January 19, 1994, submitted to The Chief Justice.
2	Dec 10 1993		Application (A93-475) granted by the Chief Justice extending the time to file until January 19, 1994.
3	Jan 19 1994	G	Petition for writ of certiorari filed.
5	Feb 8 1994		Order extending time to file response to petition until March 24, 1994.
8	Mar 23 1994		Brief of respondents National Treasury Employees Union, et al. in opposition filed.
6	Mar 24 1994		Brief amicus curiae of Common Cause filed.
7	Mar 30 1994		DISTRIBUTED. April 15, 1994 (Page 15)
20	Apr 18 1994		Petition GRANTED.
			**********
11	May 18 1994		Writ of certiorari as to respondent Thomas C. Fishell dismissed pursuant to Rule 46.
13	May 25 1994		Order extending time to file brief of petitioner on the merits until June 13, 1994.
14	Jun 9 1994		Joint appendix filed.
15	Jun 10 1994		Brief amicus curiae of Common Cause filed.
16	Jun 13 1994		Brief of petitioners United States, et al. filed.
19	Jun 17 1994		Order extending time to file brief of respondent on the merits until July 29, 1994.
21	Jul 29 1994		Brief amici curiae of Freedom to Read Foundation, et al. filed.
22	Jul 29 1994		Brief of respondents National Treasury Employees Union, et al. filed.
23	Jul 29 1994		Brief amicus curiae of Public Citizen, Inc. filed.
24	Jul 29 1994		Brief amicus curiae of Senior Executives Association filed.
25	Jul 29 1994		Brief amicus curiae of Peter Bollen filed.
26	Aug 9 1994		CIRCULATED.
27	Aug 17 1994		SET FOR ARGUMENT TUESDAY, NOVEMBER 8, 1994.(1ST CASE).
30	Aug 19 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia.
29	Sep 1 1994	X	Reply brief of petitioners filed.
31	Sep 7 1994		Record filed.
		*	Original record proceedings United States District Court

No. 93-1170-CFX

Entry	Date	Note	Proceedings and Orders
			for the District of Columbia.
32	Nov 8 1994		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 501(b) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501 (Supp. IV 1992), prohibits the receipt of honoraria for any appearance, speech, or article by Members of Congress and by employees and officers in all three branches of government. The questions presented are:

1. Whether Section 501(b) violates the First Amendment rights of employees in the Executive Branch by prohibiting the receipt of honoraria when neither the expression nor the payment has any nexus to federal employment.

2. Whether, if Section 501(b) does infringe the First Amendment to that extent, the court of appeals erred in completely invalidating Section 501(b) as applied to all expression by Executive Branch employees, rather than invalidating it only as applied to cases where neither the expression nor the payment has any nexus to federal employment.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the United States, the Office of Government Ethics, the Attorney General, the Director of the Office of Government Ethics, the National Treasury Employees Union, Jan Adams Grant, Thomas C. Fishell, the American Federation of Government Employees, David E. Hubler, Peter G. Crane, Richard Deutsch, William H. Feyer, Judith L. Hanna, George J. Jackson, Eduard Mark, Arnold A. Putnam, Charles E. Fager, and Robert A. Gordon. The district court also certified a class representing all employees in the Executive Branch below the grade of GS-16.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

NO.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-58a, is reported at 990 F.2d 1271. The opinions filed on the denial of rehearing en banc, App., *infra*, 80a-107a, are unreported. The opinion of the district court, App., *infra*, 59a-78a, is reported at 788 F. Supp. 4. An opinion of the court of appeals affirming the denial of a preliminary injunction is reported at 927 F.2d 1253.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. The petition for rehearing was denied on September 21, 1993. On December 10, 1993, the Chief Justice ex-

tended the time within which to file a petition for a writ of certiorari to and including January 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech." The relevant portion of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501 *et seq.* (Supp. IV 1992), is set forth in the appendix to the petition. App., *infra*, 108a-113a. The relevant regulations implementing that Act are set forth in the appendix to the petition. App., *infra*, 114a-134a.

STATEMENT

1. In the Ethics Reform Act of 1989 (Reform Act), Pub. L. No. 101-194, 103 Stat. 1716, Congress provided that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 103 Stat. 1760, codified at 5 U.S.C. App. 501(b) (Supp. I 1989). The prohibition was made applicable to all officers or employees of the federal government except for Senators, senate staff, and "special Government employee[s]," as defined in 18 U.S.C. 202. 103 Stat. 1761-1762, codified at 5 U.S.C. App. 505(1) and (2) (Supp. I 1989). The term "honorarium" was defined to mean

> a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

103 Stat. 1762, codified at 5 U.S.C. App. 505(3) (Supp. I 1989).

In 1991, Congress amended Section 505 by extending the prohibition against the receipt of honoraria to the Senate and its staff. Congressional Operations Appropriations Act of 1991, Pub. L. No. 102-90, Tit. I, § 6(b)(2), 105 Stat. 450. In the same Act, Congress also amended the definition of honorarium to deal specifically with a series of appearances, speeches, or articles. Tit. III, § 314(b), 105 Stat. 469. The definition, as amended, now reads:

> The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

5 U.S.C. App. 505(3) (Supp. IV 1992).[1]

2. Section 501(b) was enacted into law on November 30, 1989, and was to take effect on January 1, 1991. Reform Act, Tit. VI, § 603, 103 Stat. 1763. In late 1990, before the provision went into effect, several Executive Branch employees and unions that represent them commenced actions in the United States District Court for the District of Columbia challenging the constitutionality of the honoraria ban under the First Amendment and seeking an injunction against its enforcement.[2] App., *infra*, 3a, 60a-61a; C.A. Joint Appendix

[1] With respect to Executive Branch employees, the Act is administered by the Office of Government Ethics (OGE) and designated agency ethics officers, 5 U.S.C. App. 503(2) (Supp. IV 1992). OGE has promulgated implementing regulations. 5 C.F.R. 2636.201 *et seq.* set forth at App., *infra*, 114a-134a. The Act is enforceable through a civil action brought by the Attorney General seeking a penalty of not more than $10,000 or the amount of prohibited compensation received, whichever is greater. 5 U.S.C. App. 504(a) (Supp. IV 1992).

[2] Respondents also requested a preliminary injunction. The district court denied that relief, and its denial was upheld on appeal. *National Treasury Employees Union* v. *United States*, 927 F.2d 1253 (D.C. Cir. 1991).

30A-30NN. The district court consolidated the actions, certified a class of all federal employees below grade GS-16 who would receive honoraria but for the prohibition contained in Section 501(b), and granted summary judgment in favor of the plaintiffs. App., *infra*, 3a, 60a, 78a.

The court ruled that Section 501(b) violates the First Amendment rights of Executive Branch employees because it is "over-inclusive" to the extent it prohibits the receipt of honoraria despite the absence of a relationship between the subject matter of the expression and the employee's federal employment or the identity or motives of the payor. App., *infra*, 73a. The court also ruled that the provision is constitutionally "under-inclusive" to the extent that it permits artists or performers to receive honoraria while barring similar payments to speechmakers and essayists. *Ibid.* As relief, the court struck down the honoraria ban in its entirety as applied to Executive Branch employees, but left the ban intact as applied to the Legislative and Judicial Branches.[3] *Id.* at 73a-78a.

3. A divided court of appeals affirmed. App., *infra*, 1a-58a. The majority concluded that Section 501(b) violates the First Amendment rights of federal employees because the honoraria ban is not "narrowly tailored." *Id.* at 14a. The court noted that Section 501(b) prohibits honoraria even when the payment has no "nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 9a. It concluded that, absent such a nexus, the receipt of honoraria would create neither actual impropriety nor the appearance of impropriety on the part of federal employees. *Ibid.* The court also concluded that Congress's across-the-board ban on the receipt of honoraria by Executive Branch employees could not be justified as a prophylactic measure to prevent abuses or to avoid administrative bur-

[3] The district court enjoined the government from enforcing the ban, but stayed its judgment and permanent injunction "pending completion of proceedings on any timely appeal." App., *infra*, 78a.

dens in determining whether particular compensated speech has a nexus to federal employment. *Id.* at 11a-14a.

Having held that Section 501(b) has an unconstitutional "excess sweep," the court of appeals turned to the issue of remedy. App., *infra*, 14a. The court recognized that it should "refrain from invalidating more of the statute than is necessary." *Ibid.* (citation omitted). Nevertheless, the court concluded that Section 501(b) must fall in its entirety as applied to Executive Branch employees because the provision "does not seem to admit of any construction that would trim off all or even most of the invalid applications to executive branch employees." App., *infra*, 14a. The court stated that "[a]rticulation of some appropriate nexus test" to limit Section 501(b) to constitutional scope "would seem a purely legislative act." *Ibid.*

The court of appeals found, however, that the application of the honoraria ban to the Legislative and Judicial Branches could be saved. In the court's view, Congress "clearly would have gone forward [with Section 501(b)] as to the legislative branch and in all probability as to the judicial [branch]," even if Congress had known of the provision's "unconstitutionality as applied to executive branch employees." App., *infra*, 15a. The court therefore left Section 501(b) in place as applied to the Legislative and Judicial branches. *Id.* at 17a-18a.

Judge Sentelle filed a lengthy dissent. App., *infra*, 20a-58a. He argued that the majority had erred in treating this case as presenting a facial challenge to Section 501(b), rather than a challenge to the honoraria ban as applied to the plaintiffs. He also contended that the flat ban on honoraria is justified by the government interest in avoiding the appearance of impropriety on the part of Executive Branch employees, and by the interest in devising an administrable prohibition. Finally, he believed that the majority had erred in determining which applications of the statute to sever.[4]

[4] Judge Sentelle thought that the majority's facial invalidation of the honoraria ban should have led it to strike the phrase " 'officer or

4. The United States sought rehearing, and suggested rehearing en banc. The court of appeals denied the petition for rehearing and, over the dissents of Judges Sentelle and Silberman, rejected the suggestion for rehearing en banc. App., *infra*, 79a-81a. Judge Silberman's dissent remarked that the "intrinsic importance of [the panel's] decision"—finding the honoraria ban unconstitutional as to the Executive Branch, but not as to the Legislative or Judicial Branches—"is hardly to be questioned." *Id.* at 88a.

REASONS FOR GRANTING THE PETITION

When Congress recently revised the ethics laws governing the conduct of federal officials, it imposed a uniform and complete ban on honoraria for federal employees and officials in all three branches of government. In the wake of criticism of the practice of receiving honoraria, Congress determined that a flat ban was necessary to ensure the integrity, and the appearance of integrity, of those individuals who represent and are employed by the federal government.

The court of appeals' decision overturns a large part of that congressional judgment by declaring a federal statute unconstitutional. The court held that the honoraria ban violates the First Amendment by prohibiting compensation for expression that has no nexus to an employee's federal status. It went on to invalidate the honoraria ban in all its applications to federal employees in the Executive Branch, whether or not such a nexus exists in a particular case or in a class of cases. In so holding, the court of appeals rendered a decision of far-reaching importance that affects millions of federal workers. That decision conflicts with this Court's precedents and warrants this Court's review.

1. Regulation of the speech of government employees is judged under a unique First Amendment test; a court's task is

employee' in its entirety from the statute, leaving the honorarium ban in place only as to Members of Congress." App., *infra*, 57a.

to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). A compelling reason for regulating expressive activity by government employees is to prevent actual or apparent impropriety. The citizenry must have confidence that the personnel responsible for the public's business are not subject to undue influence by private special interests. Accordingly, it is consistent with the First Amendment for Congress to take strong measures to protect the integrity and the appearance of integrity of the federal workforce, so long as the behavior it seeks to regulate may be "reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947) (upholding the Hatch Act); *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-567 (1973) (same).[5]

a. In striking down the honoraria ban, the court of appeals departed from this Court's teachings. The court of appeals recognized that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." App., *infra*,

[5] It is important to notice that Section 501(b) does not prohibit any speech; it prohibits the receipt of honoraria as compensation for speech by those who have accepted the responsibility of federal employment (and who are paid for doing so). While removing a financial incentive to engage in expression does trigger First Amendment concern, see *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the character of the restriction in Section 501(b) is far less onerous than an outright ban on expression. As the court of appeals acknowledged, the "financial character" of the restriction is relevant to the "'weight' of the employees' interest in the *Pickering* balance." App., *infra*, 6a.

6a. The court further noted that it could "safely assume * * * that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation *where the compensation creates such an appearance.*" *Ibid.* The court concluded, however, that the practice of receiving honoraria poses problems that justify a ban only when there is a "nexus between the employee's job and either the subject matter of the expression or the character of the payor"; only then is there "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." *Id.* at 9a.

Congress, however, could have "reasonably deemed" honoraria to pose a threat to the public's perception of the integrity of the federal workforce, whether or not a specific nexus can be shown. *United Public Workers* v. *Mitchell*, 330 U.S. at 101. The public is not likely to be aware of the full range of responsibilities of a particular employee, or whether the payor of the honorarium has a specific interest in a matter pending before a particular agency. Any payment for employee speech may therefore trigger citizen concern. The interest in eliminating *all* suspicion about the cause or effect of a particular honorarium justifies a flat ban, with no grey areas. The court of appeals erred by substituting its judgment for Congress's about when the receipt of honoraria may give rise to a possible appearance of taint.[6]

[6] The court suggested that Congress needed to have concrete evidence "that the public actually perceives a risk of corruption in receipt by low-level government employees of remuneration for talks on topics that are wholly unrelated to their function, to audiences that are equally unrelated." App., *infra*, 13a. This Court, however, rejected virtually the same argument in the first Hatch Act case. In *United Public Workers* v. *Mitchell*, the Court held that Congress could seek to eradicate the problems caused by partisan political activity in the federal service, even among lower-level employees, without requiring Congress to adduce prior examples of abuse. 330 U.S. at 101-102.

Section 501(b) is also justifiable as a prophylactic measure. A complete and impermeable ban prevents the evasion that a more limited rule might invite. It also avoids the interpretational difficulties posed by officials in different agencies reviewing the contents of individual appearances, speeches, or articles to determine whether a prohibited nexus exists.[7] Although the court of appeals acknowledged that this Court has sustained "broad prophylactic rules" that regulate employee activities, App., *infra*, 12a, citing *United Public Workers* v. *Mitchell*, *supra*, the court subjected Section 501(b) to a rigorous form of First Amendment scrutiny that few prophylactic rules could survive.[8]

The court observed that the government did not identify "any serious enforcement or line-drawing costs associated" with the prior system for regulating honoraria, which involved a form of nexus test. App., *infra*, 11a. There is no requirement, however, that Congress must build a record in the legislative history before enacting reasonable rules to regulate the conduct of federal employees. Congress need not wait until harms have actually materialized before eliminating a feared source of concern.

Nor is the validity of Section 501(b) called into question by the fact that Congress used a form of nexus test in Section 501(b) itself, banning honoraria for a "*series* of appearances,

[7] Designated ethics officials in each covered agency are authorized to render advisory opinions to employees interpreting the honoraria ban as applied to particular facts. 5 U.S.C. App. 504(b) (Supp. IV 1992).

[8] For the proposition that "a mere 'hypothetical possibility' of a corrupt 'exchange of political favors' is not enough" to support Section 501(b), App., *infra*, 12a, the court of appeals cited *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985), and *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). App., *infra*, 12a-13a. Both of those cases, however, examined fully protected political speech by private persons. They did not involve speech by government employees, which is judged under the more lenient *Pickering* balancing test.

speeches, or articles" only when "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government." 5 U.S.C. App. 505(3) (Supp. IV 1992) (emphasis added). Congress's adoption of a nexus approach to a series does not require it to extend the same approach to all individual cases. Rather than suggesting that Congress "regards such [nexus] lines as entirely workable" in all contexts, App., *infra*, 12a, the special rule for a "series" of appearances, speeches, or articles can be explained by the different enforcement issues that arise in that context.[9]

b. Even if the court of appeals were correct in concluding that Section 501(b) has some unconstitutional applications, the court's remedy far exceeds the scope of the purported violation. The court acknowledged that "for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality." App., *infra*, 6a. Yet the court of appeals invalidated Section 501(b) in *all* its applications to Executive Branch employees—even where the government could readily demonstrate the existence of "some sort of nexus between the employee's job and either

[9] Several factors distinguish honoraria for a series of appearances, speeches, or articles from individual instances of expression for pay. First, Congress "might reasonably have concluded" that repeated paid appearances before a particular group are "likely to be more open and more visible to the public (or the public's watchdogs) than * * * a one-time payment for a single appearance," and that "corruption is less likely under such circumstances." App., *infra*, 85a-86a (Williams, J., concurring in the denial of rehearing and rehearing en banc). Second, Congress may also have found that the larger volume of material involved in a "series" facilitates the judgment about whether a prohibited nexus exists. Third, because it is likely that relatively few employees engage in a "series" of paid appearances, speeches, or articles, requiring case-by-case review for nexus issues involving a series would present a far more manageable administrative task than if officials were required to review *all* individual instances of compensated speech by federal employees.

the subject matter of the expression or the character of the payor." *Id.* at 9a.

The sweeping relief ordered by the court of appeals is unjustified. The court began, soundly enough, by noting that it should invalidate no more of Section 501(b) than is necessary to remedy the constitutional flaw it discovered. App., *infra*, 14a. The court concluded, however, that it could not leave Section 501(b) in place as to applications in which the government *can* establish a nexus, because "[a]rticulation of some appropriate nexus test would seem a purely legislative act." *Ibid.* That analysis is incorrect. The court of appeals itself crafted a "nexus test" as an integral element of its First Amendment inquiry. *Id.* at 9a-10a. If the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), as the court of appeals held, it also can serve to identify the *constitutional* applications of Section 501(b). The court, therefore, should have limited its decision to invalidating the application of Section 501(b) to cases in which there is no nexus between the speech for compensation and the employee's federal status, and left the remaining applications in force. There was no basis for invoking any form of "overbreadth" doctrine in this case, with the effect of invalidating clearly constitutional applications of the law. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); see also *Reme* v. *Geary*, 111 S. Ct. 2331, 2340 (1991); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 503-507 (1985).

Limiting the invalidation of Section 501(b) to the actual applications of the law found to infringe First Amendment rights accords with this Court's treatment of similar issues. See *United States* v. *Grace*, 461 U.S. 171 (1983) (invalidating ban on expressive activity anywhere in the Supreme Court or its grounds only as applied to expressive activity on the sidewalk in front of the Supreme Court); *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993) (invalidating ban on all in-person solicitation of work by a certified public accountant only as

applied to solicitation in the commercial context). The court of appeals' broader ruling serves only to insulate from Section 501(b)'s remedial provisions speech that is concededly subject to regulation.[10]

2. The court of appeals' complete invalidation of Section 501(b) as applied to Executive Branch employees merits review—not only because it is incorrect, but also because the issue is important to Congress and to federal employees. The honoraria ban was not an afterthought to federal ethics legislation, but was in large measure a direct response to the reports of two prestigious commissions that had expressed concerns that the receipt of honoraria created an appearance of impropriety and undermined the confidence of citizens in the integrity of government.

The 1989 Quadrennial Commission on Executive, Legislative, and Judicial Salaries concluded that "[t]he potential for abuse or the appearance of abuse [from honoraria] is obvious to the public" and that public trust in members of Congress "is threatened by the steady growth of th[e] practice" of receiving honoraria; accordingly, the Commission "strongly recommend[ed] that the practice of accepting honoraria in all three branches be terminated by statute."[11] Similarly, the

[10] Federal law contains other statutory and administrative restrictions on employee speech for compensation when it is related to federal status. See, *e.g.*, 18 U.S.C. 201(b) and (c) (prohibiting solicitation or receipt of bribes or illegal gratuities); 18 U.S.C. 209 (1988 & Supp. IV 1992) (prohibiting receipt of compensation for government service or a supplementation of salary from a private party); 5 C.F.R. 2635.807 (specifying requirements for compensated teaching, speaking, and writing by federal employees). As a remedy for violations of Section 501(b), however, the government may recapture the unlawfully received compensation, 5 U.S.C. App. 504(a) (Supp. IV. 1992), and that remedy is not necessarily available under other provisions.

[11] *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* 24 (Dec. 1988) (Quadrennial Commission report), *reprinted at* C.A. Joint Appendix 39.

Wilkey Commission, a blue-ribbon presidential panel on ethics reform, noted that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor," and it stated that "in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government, * * * [the Wilkey Commission] joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government."[12] The Wilkey Commission specifically concluded that the ban must be a comprehensive one to achieve its purpose: "To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities."[13]

In embracing the contemporaneous recommendations of two respected panels whose members had significant experience in public service, Congress adopted a policy that was intended to help restore public trust and confidence in the federal government. That policy has now been invalidated by the court of appeals' holding that the uniform honoraria ban that Congress enacted cannot withstand constitutional scrutiny. Under the court of appeals' holding, the Legislative and Judicial Branches, but not the Executive Branch, are subject to the honoraria ban. The issue of whether Congress's considered judgment must be overridden on First Amendment grounds merits this Court's attention.

[12] *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* 35-36 (Mar. 1989) (Wilkey Commission report), *reprinted at* C.A. Joint Appendix 139-140.

[13] Wilkey Commission report at 36, C.A. Joint Appendix 140.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 92-5085, 92-5139, 92-5170, 92-5235,
92-5236 and 92-5237

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

PETER G. CRANE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

v.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.,

v.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

PETER G. CRANE, ET AL.

v.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

Argued Nov. 6, 1992
Decided March 30, 1993
As Amended April 8, 1993

Before: WILLIAMS, SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

Concurring opinion filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge SENTELLE.

STEPHEN F. WILLIAMS, Circuit Judge:

In § 501(b) of the Ethics in Government Act, 5 U.S.C. app. § 501 *et seq.*, Congress provided that "[a]n individual may not receive any honorarium while that individual is a Member [of Congress, or] officer or employee [of the federal government]." Congress defined "honorarium" as "a payment of money or anthing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's

status with the Government) . . . excluding any actual and necessary travel expenses." *Id.* § 505(3). The Office of Government Ethics has promulgated regulations implementing the Act for officers and employees of the executive branch. See 56 Fed.Reg. 1721 (January 17, 1991) (to be codified at 5 CFR § 2636.101ff.); 57 Fed.Reg. 601 (January 8, 1992) (amending 5 C.F.R. § 2636.-203).

Employees of the executive branch, and several unions of such employees, responded to enactment of the honorarium ban by challenging it in district court as a violation of their rights under the First Amendment. The National Treasury Employees Union was certified as the class representative for all affected executive branch employees below the grade of GS-16,[1] and the various cases were consolidated.

On cross motions for summary judgment, the district court found the ban a violation of the First Amendment in so far as it affected the speech of executive branch employees.[2] It enjoined enforcement, but stayed its judgment pending appeal. 788 F.Supp. 4. The government appeals from the judgment and injunction, and plaintiffs appeal from the stay. We affirm the judgment of the district court on the merits; this moots the problem of the stay.

* * *

Because the case involves a government burden on the speech of its own employees, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), supplies the standard for judicial review of the congressional action. In *Pickering* a county had dismissed a teacher for

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[1] All but one of the individually named challengers fall into this class; the one exception is Peter G. Crane, a GS-16 executive branch employee.

[2] Before the summary judgment decision, the district court denied a preliminary injunction. We affirmed the denial, *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C.Cir. 1991).

publishing in a newspaper a letter criticizing the county school board's allocation of funds. While saying that the state could not make public employment conditional upon relinquishment of "the First Amendment rights [employees] would otherwise enjoy as citizens to comment on matters of public interest", *id.* at 568, 88 S.Ct. at 1734, the Court also said that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* It identified the "problem" as being "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

As *Pickering* defines the employees' speech interests in terms of "matter[s] of public concern", see also *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983), we pause briefly to consider whether this case involves such matters. In *Connick* the Court spoke broadly of expression "relating to any matter of political, social, or other concern to the community." Viewing the idea of "public concern" in the abstract, one might suppose it excluded some of the topics on which plaintiffs have spoken or written—such as the technology of Civil War ironclads. See Joint Appendix ("J.A.") at 119.

But *Connick* makes clear that the "public concern" criterion does not require any great intensity or breadth of public interest in the subject. It is thus far broader than the sort of "public questions" in which a person must be involved for application of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C.Cir. 1980). In *Connick* the

employee had circulated a questionnaire asking fellow employees for their views on such matters as the level of office morale, their confidence in various supervisors and the need for a grievance committee. These the Court wrote off as "mere extensions of Myers' dispute over her transfer". 461 U.S. at 148, 103 S.Ct. at 1690. In contrast, it found a question on whether employees ever felt "pressured to work in political campaigns on behalf of office supported candidates" to be of interest to the community. *Id.* at 149, 103 S.Ct. at 1691. The contrast, then, was between issues of external interest as opposed to ones of internal office management. See also *id.* at 146, 103 S.Ct. at 1689 (invoking need for officials to "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary"). Accordingly, we read the "public concern" criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche. None of the samples of past or intended expression mentioned by plaintiffs involves such a parochial concern.

Although § 501(b) prohibits no speech, it places a financial burden on speech—denial of compensation. While the employees' First Amendment interest is therefore somewhat less weighty than under a flat ban, there can be no doubt that the burden counts for purposes of the *Pickering* balance. In *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991), the Supreme Court considered a statute that singled out compensation for writings by a person convicted or accused of a crime on the subject of his crime. Though at times seeming to characterize the statute as content-based, see, e.g., *id.* at ___, 112 S.Ct. at 508, the Court ultimately declined to say whether it was or not, and invalidated it as not "narrowly tailored" enough even under "the more lenient tailoring standards applied" to content-neutral provisions, *id.* at ___-___ n. **, 112

S.Ct. at 511-12 n. **. The point that the burden was simply denial of compensation played no apparent role in the Court's "tailoring" analysis. Similarly, the financial character of the limitation here affects only the "weight" of the employees' interest in the *Pickering* balance.

Neither party disputes that the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria. Indeed, in *Keefe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C.Cir. 1985), we identified "prevent[ing] erosion of congressional and public confidence in the integrity of the [Congressional Research] Service" as a compelling justification for limits on its analysts' participation in political activities. We can safely assume for the purposes of this opinion that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation *where the compensation creates such an appearance*, and so is strong enough to justify a ban on compensation in those circumstances. Thus, for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality.

That conclusion will not save § 501(b), however, if it either is "overbroad" or manifests a want of "narrow tailoring." Plaintiffs in their attack on the statute use the terms more or less interchangeably. So has the Supreme Court, on occasion, when speaking of the substance of the doctrines, i.e., what they demand of a statute in terms of focus on a genuine evil. Thus in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), the Court started its analysis of the subject by posing the question whether the statute was "sufficiently narrowly tailored to achieve its goal", *id.* at 660, 110 S.Ct. at 1397, and ended by finding that it was "not substantially overbroad", *id.* at 661,

110 S.Ct. at 1398. See also *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 965-66 n. 13, 104 S.Ct. 2839, 2851-52 n. 13, 81 L.Ed.2d 786 (1984) (" 'Overbreadth' has also been used to describe a challenge to a statute that . . . does not employ means narrowly tailored to serve a compelling government interest"); cf. *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. at ___, 112 S.Ct. at 511-12 (addressing whether law "is significantly overinclusive" and concluding that it "is . . . not narrowly tailored to achieve the State's objective"). Moreover, the terms used by the Court to describe the doctrines' substance do not seem to suggest a material difference. As to overbreadth, the Court said in *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real [i.e., not based on speculative constructions of the statute] but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2917. And in its most explicit treatment of narrow tailoring, *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), it said:

> [T]he requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." . . . To be sure, this standard does not mean that a . . . regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at 799, 109 S.Ct. at 2758 (citations and footnote omitted). Although *Ward* involved a time, place, and manner restriction, the Court has since indicated that this concept of "tailoring"

applies to any content-neutral restriction on speech. See *Simon & Schuster*, ___ U.S. at ___ n. **, 112 S.Ct. at 511 n. **. Thus both doctrines invalidate a statute that imposes "substantial" burdens that are not supported by the statute's justifications; i.e., both invalidate statutes that are unduly "overinclusive."

Conceivably the quality of fit demanded by the two doctrines differs. The Court has stressed that overbreadth is "strong medicine", *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, possibly suggesting that a plaintiff can prevail under that doctrine only by showing more drastic overinclusiveness than would be necessary to prevail on a narrow tailoring claim. Such a view might make some sense, as overbreadth (in its classic form) gives the plaintiff a procedural advantage—the ability to challenge a statute on the basis of its effect on *others*—see, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093 (1940); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-98, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984); *Board of Trustees v. Fox*, 492 U.S. 469, 482-83, 109 S.Ct. 3028, 3035-36, 106 L.Ed.2d 388 (1989)—in exchange for which he might be expected to surmount an exceptional substantive hurdle. But, as developed below, we cannot see that § 501(b) satisfies even the most lenient form of the requirement.

Although the Supreme Court has occasionally suggested that courts may proceed to consider a facial overbreadth challenge only after having determined that it is valid as applied to the challengers, see, e.g., *Fox*, 492 U.S. at 484-85, 109 S.Ct. at 3037, in fact the Court allows facial overinclusiveness claims by parties whose conduct may well be constitutionally protected—such as many of the plaintiffs here. In *Austin v. Michigan Chamber of Commerce*, for example, the Chamber of Commerce mounted a pre-enforcement facial challenge to a state restriction on corporate political expenditures, maintaining that its speech was in fact protected. 494 U.S. at 661-65. Yet the Court addressed the facial attack on the statute's scope.[3] See also *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13-15, 108 S.Ct. 2225, 2234-35, 101 L.Ed.2d 1 (1988) (applying standard overbreadth analysis without even considering whether members of the Association could be legitimately subject to the ordinance); *Boos v. Barry*, 485 U.S. 312, 329-32, 108 S.Ct. 1157, 1168-69, 99 L.Ed.2d 333 (1988) (applying overbreadth analysis without either a concession by plaintiffs that their speech could be constitutionally restricted or a finding to that effect, and indeed in the face of indications that they claimed their speech was protected, see *id.* at 315-16, 108 S.Ct. at 1160-61), affirming in relevant part *Finzer v. Barry*, 798 F.2d 1450, 1472 (D.C.Cir. 1986) (addressing facial attack on the statute's scope in the face of the challengers' assertion that their speech was protected); but cf. *Sanjour v. EPA*, 984 F.2d 434, 444 & n. 10 (D.C.Cir. 1993).

Accordingly we reach the merits of the plaintiffs' overinclusiveness claims. To create the sort of impropriety or appearance of impropriety at which the statute is evidently aimed, there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor. But as to many of the plaintifffs, the government identifies no such nexus. These plaintiffs include a Nuclear Regulatory Commission lawyer who writes on Russian history of the late Romanov era, see J.A. at 51; a Postal Service mailhandler who writes and gives speeches on the Quaker religion, *id.* at 63; a Department of Labor lawyer who lectures on Judaism, *id.* at 70; a Department of Health and Human Services employee who reviews art, musical, and

[3] Although the Court in *Austin* ultimately rejected the Chamber's claim that its conduct was protected, 494 U.S. at 661-65, 110 S.Ct. at 1398-1400, the sequence in which the Court addressed the matter is inconsistent with the idea that facial overinclusiveness claims can only be raised by parties whose conduct is not protected.

theater performances for local newspapers, *id.* at 95; and a civilian Navy electronics technician who writes on Civil War ironclad vessel technology, *id.* at 119. The topics appear not to be such that the employee could have used information acquired in the course of his government work; there is no suggestion of any use of government time, word processors, paper or ink; there is no suggestion that the institutions that have paid or are likely to pay for the speeches or writings would have some relationship with the employee's agency that would make them wish to curry its favor.

Of course the ban also covers payments for speeches and articles that may well create an appearance of impropriety. In fact, even some of the plaintiffs receive payments that might at least raise an eyebrow. For example, a business editor at the Voice of America also receives payment for business analysis that he provides various media. J.A. 57-62. From his own account it seems at least quite possible that he uses information acquired on the job; and it is possible that the media to whom he sells might believe that his favor could improve the chances that VOA would use some of their materials. (The editor suggests that banning compensation for his writings and talks will make government service far less attractive to hard-working, intelligent, creative persons. Surely this is so. We do not here address whether such values might count in the *Pickering* balance.) Another plaintiff is a GS-7 "tax examining assistance". See J.A. 85-86. In view of the universality of citizens' subjection to the Internal Revenue Service, we can understand some anxiety about receipt of payment by such an employee. However, even assuming arguendo that § 501(b) could be lawfully applied to these last two plaintiffs, it is clear that the ban reaches a lot of compensation that has no nexus to government work that could give rise to the slightest concern.[4]

[4] The presence of some permissible applications of the statute that are "easily identifiable" does not immunize a statute from facial invalidation. Compare Dissent at 7-8. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), says only that a statute may not be invalidated as overbroad when, "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." *Id.* at 964-65, 104 S.Ct. at 2850-51 (citations and ellipses omitted). Similarly, *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), holds only that when the threat to protected speech is limited, and the statute covers "a whole range of easily identifiable and constitutionally proscribable" conduct, the statute is not substantially overbroad. *Id.* at 580-81, 93 S.Ct. at 2897-98. Both these cases contrast very limited risks of invalid encroachments on speech with a broad range of permissible applications—not the situation we face in this case, in which the scope of the invalid applications is large.

There remains the possibility that these apparent excesses might be legitimized by the enforcement difficulties—including the problem of government scrutiny of subject matter—that any narrower restriction would involve. (Ironically, one plaintiff objects to even the screening that is involved in enforcement of § 501(b). J.A. 64.) If manageable lines are available to limit the ban to genuinely troubling compensation, then excesses, even if they affected few speakers, would appear gratuitous.

In fact, however, the government points neither to improprieties in the pre—§ 501(b) era that would have been prevented by § 501(b) but not by the prior regulations, nor to any serious enforcement or line-drawing costs associated with those regulations. Cf. *Boos v. Barry*, 485 U.S. at 324-29, 108 S.Ct. 1165-68 (stating that the "most useful starting point" for assessing whether a statute is narrowly tailored is to "compare it with an analogous statute"). As summarized in testimony before the Senate Committee on Governmental Affairs, the prior regulations allowed honoraria so long as the speaker or writer held a rank lower than GS-16 and all of the following questions could be answered negatively:

(1) Is the honorarium offered for carrying out government duties or for an activity that focuses specifically on the employing agency's responsibilities, policies and programs?

(2) Is the honorarium offered to the government employee or family member because of the official position held by the employee?

(3) Is the honorarium offered because of the government information that is being imparted?

(4) Is the honorarium offered by someone who does business with or wishes to do business with the employee in his or her official capacity?

(5) Were any government resources or time used by the employee to produce the materials for the article or speech or make the appearance?

S.Rep. No. 29, 102d Cong., 1st Sess., at 8 (1991). While some of the limits may have an amorphous quality about them (such as the one purporting to probe the motive of the honorarium's offeror), there appears no actual experience of difficulty, and one can hypothesize rules of thumb that could constrain government discretion. Indeed, Congress's use of similar criteria to cover a "*series* of appearances, speeches, or articles", which § 501(b) as amended allows unless "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government", suggests that it regards such lines as entirely workable.

While no one questions the authority of Congress to enact broad prophylactic rules, see *United Public Workers v. Mitchell*, 330 U.S. 75, 102, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947), a mere "hypothetical possibility" of a corrupt "exchange of political favors" is not enough. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498, 105 S.Ct. 1459, 1469, 84 L.Ed.2d 455 (1985); see also *id.* at 500-01,

105 S.Ct. at 1470 (government evidence trying to link corruption to independent expenditures by PACs fails to pass "rigorous" First Amendment standard of review); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, 1422, 55 L.Ed.2d 707 (1978). Of course where it is in the nature of the evil to be averted that it will be concealed, the court will necessarily expect less evidence. Thus, in upholding the Hatch Act, 5 U.S.C. § 7324 *et seq.*, the Court pointed out that one important concern was to ensure that "Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 566, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973). The potential for such subtle pressure is not only pervasive but inherently difficult to demonstrate or assess; thus, the absence of episodes coming to light is quite consistent with the congressional concern. Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 26-27, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976), the Court noted that "the full scope of such pernicious practices [as political *quid pro quos* for large campaign contributions] can never be reliably ascertained," and then went on to observe that "deeply disturbing examples" of such arrangements had surfaced in the 1972 elections. Evidently the Court believed that the surreptitious character of a possible evil could explain the absence of evidence, at least if the evil's existence could reasonably be inferred (as from human nature and the character of the political process). In contrast, here the government does not suggest that the public actually perceives a risk of corruption in receipt by low-level government employees of remuneration for talks on topics that are wholly unrelated to their function, to audiences that are equally unrelated. Nor does it suggest any reason to infer the likelihood of such

perceptions, nor any reason why we would not see evidence of such perceptions if they existed.

As the apparently excess sweep of § 501(b) is supported by no more than the theoretical possibilities viewed as inadequate in *National Conservative Political Action Committee*, we cannot find § 501(b) "narrowly tailored".[5]

* * * * *

Our final step is to determine the proper remedy. In general, a court should "refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1479, 94 L.Ed.2d 661 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487 (1984) (plurality opinion)). But the language of § 501(b)—"[a]n individual may not receive *any* [payment for an appearance, speech or article]" (emphasis added)—does not seem to admit of any construction that would trim off all or even most of the invalid applications to executive branch employees; indeed the government proposes no limiting construction. Articulation of some appropriate nexus test would seem a purely legislative act.

This leaves open the possibility, however, that § 501(b)'s application to executive branch employees may be severable from the remainder of the statute. No party here has argued that § 501(b) is unconstitutional as applied to members of Congress, officers or employees of Congress, or judicial officers or employees, and any such claim would raise quite different considerations. Legislators and judges and their staffs are likely to have to deal with a wide range of issues, so that a party purportedly paying for speech or writing by any of them is more likely to anticipate gaining some advantage, or at least to be *seen* as hoping for such an advantage. The trade-off

[5] Because § 501(b) is unconstitutional for want of narrow tailoring, we do not reach the argument that it is unconstitutionally underinclusive.

between preventing excess applications and keeping administrative costs low would be different from what it is for executive branch employees.

Whether an unconstitutional provision is severable "is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. at 653, 104 S.Ct. at 3269. " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Buckley v. Valeo*, 424 U.S. at 108-09, 96 S.Ct. at 677 (quoting *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932)).

Section 501(b) does not contain a severability clause, and the legislative history yields no direct evidence of intent concerning severability. Thus, we must ask whether there is anything in the history indicating that Congress would have enacted the honorarium ban if it had been aware of its unconstitutionality as applied to executive branch employees. *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 685, 107 S.Ct. at 1480.

In this case the evidence is that it clearly would have gone forward as to the legislative branch and in all probability as to the judicial. First, the floor debates indicate that Congress was principally concerned that the receipt of honoraria by Members of Congress created the appearance of influence-buying. Speakers throughout the debates refer to "Members of Congress" in explaining why the honorarium ban was necessary. See, e.g., 135 Cong.Rec. H8756 (daily ed. Nov. 16, 1989). For example, at one point a congressman noted that "the elimination of honoraria will have a beneficial impact on the public's perception of *the integrity of Congress as an institution.*" *Id.* at H8763 (emphasis added). Another congressman noted that the statute addressed "the underlying sources of abuse in the current income system for public employees, *in*

particular for Members of Congress." *Id.* at H8767 (emphasis added).

Similarly, the Report of the Bipartisan Task Force, issued after the Act was passed, also indicates a primary concern with the receipt of honoraria by Members of Congress. In describing the background of the ban the report states that "substantial payments to a Member of Congress for rendering personal services to outside organizations presents a significant and avoidable potential for conflict of interest." *Id.* at H9256. The report continues by describing how the increase in Members' honoraria income in recent years "has heightened the public perception that honoraria is [sic] a way for special interests to try to gain influence or buy access to Members of Congress," *id.* at H9257, and noting the "growing concern that the practice of acceptance of honoraria by Members . . . creates serious conflict of interest problems and threatens to undermine the institutional integrity of Congress." *Id.* Nowhere did members of Congress display any specific concern with the receipt of honoraria by executive branch employees, much less indicate that the application of the ban to them was a condition of the bill's passage.

Further, the honorarium ban was adopted as part of a package of which a key ingredient was a sharp increase in the salary of members of Congress, judges, and a limited class of senior executive branch officials. See *id.* at H9254, H9268-69 (describing Title III of the Act). The one clearly detectable interdependency between segments of the statute was between the ban and the salary increase. See, e.g., *id.* at H8756 (statement of Congressman Packard); *id.* at H8766/1-2; *id.* at H8767; *id.* at H9254 (stating that the pay raise would be given "as part of the ban on honoraria"). Striking down the application of the honorarium ban as to members of Congress and judges—while leaving their salary increases in place (a constitutional necessity for the latter)—would truly violate the intent of Congress.

Nominally, the invalidation of the honorarium ban as to executive branch employee upsets some of the intended balance (the salary increase for senior officials survives, the honorarium ban falls). But as other, severe restrictions have applied to senior executive branch officials anyway, see, e.g., E.O. 12674 (April 12, 1989)[6] (providing that "[no] employee who is appointed by the President to a full-time noncareer position in the executive branch . . . shall receive any earned income for any outside employment or activity performed during that Presidential appointment"), the effect on senior officials benefitting from the salary increase may well be nil.

We cannot, as a technical matter, achieve the intended severance simply by striking the words "officer or employee" from § 501(b), as that would invalidate the ban beyond the executive branch. See § 505(3) (defining "officer or employee" as "any officer or employee of the government", and in context indisputably encompassing employees of Congress and judicial officers and employees). However, given the far greater congressional interest in banning honoraria for the legislative and judicial branches, we think it a proper form of severance to strike "officer or employee" from § 501(b) *except* in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees. Compare 5 U.S.C. app. 6, § 101(f)(9)-(12) (definition of "officers and employees" in related ethics legislation, encompassing persons in all three branches but distinguishing between them). This severance is similar to the type employed by the Court in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). There the Court "pretermit[ed]" the issue of whether "lust" might be *construed* as referring only to morbid and shameful

[6] 54 Fed.Reg. 15159, § 102, as amended by E.O. 12731 (October 7, 1990), 55 Fed.Reg. 42547, § 102.

interests (rather than also encompassing " 'good, old-fashioned, healthy' interest in sex"), *id.* at 498-501, 105 S.Ct. at 2798-2800, and instead *severed* from the statute any meaning of lust other than shameful and morbid interests, *id.* at 506-07, 105 S.Ct. at 2803.

The decision of the district court is
Affirmed.

RANDOLPH, Circuit Judge, concurring:

I join fully Judge Williams' opinion. I write separately because it seems worth pointing out that the dissent has mixed up two different questions: who may bring a facial constitutional challenge to a statute? and when may such a challenge succeed? The first goes to standing, the second to the merits. Established Supreme Court doctrine on both questions depends on whether the facial attack rests on First Amendment free-speech grounds. If it does, the plaintiff need not show that his speech deserves First Amendment protection; he has standing to contest the statute's constitutionality with respect to the speech of others. *See, e.g., New York v. Ferber,* 458 U.S. 747, 767-73, 102 S.Ct. 3348, 3359-63, 73 L.Ed.2d 1113 (1982); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980); *Gooding v. Wilson,* 405 U.S. 518, 520-21, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). As far as the merits are concerned, the usual rule is that a facial attack will not be sustained unless there is no set of circumstances in which the statute could constitutionally be applied. *See, e.g., United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987); *National Fed'n of Fed. Employees v. Greenberg,* 983 F.2d 286, 292 (D.C.Cir. 1993). In free-speech cases, the rule, an aspect of the "overbreadth" doctrine, is nearly the opposite: a statute is invalid in all its applications if

it is invalid in any of them, or at least enough to make it "substantially" overbroad. *See, e.g., Federal Election Comm'n v. National Conservative Political Action Comm.,* 470 U.S. 480, 490-501, 105 S.Ct. 1459, 1465-70, 84 L.Ed.2d 455 (1985); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786-95, 98 S.Ct. 1407, 1421-26, 55 L.Ed.2d 707 (1978); *Buckley v. Valeo,* 424 U.S. 1, 44-51, 96 S.Ct. 612, 646-50, 46 L.Ed.2d 659 (1976) (per curiam). The dissent garbles these distinctions and winds up with the following untenable proposition—if the parties before the court are alleging that the statute unconstitutionally restricts *their* freedom of speech, rather than the speech of absent third parties, the statute is unconstitutional on its face only if it is unconstitutional in all its applications to them. In other words, § 501(b) of the Ethics in Government Act would be facially invalid if the only plaintiff were a GS-14 Labor Department employee making money from articles about government labor policy. But in this case it is not facially unconstitutional, according to the dissent, because everyone to whom the statute could be unconstitutionally applied is before the court. This is the equivalent of saying that if you would not have had standing in a non-free speech case, you win on the merits; but if you have standing even under the usual rules, you lose.

As to the analysis under *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the dissent thinks the ban on federal employees' receiving payment for writing articles imposes a "moderate burden *at most.*" Dr. Johnson saw things rather differently: "No man but a blockhead ever wrote, except for money." 4 BOSWELL'S LIFE OF JOHNSON 29 (A. Birrell ed. 1904). Depending on what constitutes a blockhead, the aphorism may be tautological or too broad. Boswell himself had his doubts (*id.*). But the general proposition—that depriving authors of payment for their works significantly discourages writing—is one of the

premises of the Supreme Court's decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, ___, ___, 112 S.Ct. 501, 508-09, 511-12, 116 L.Ed.2d 476 (1991); *see also* ___ U.S. at ___, 112 S.Ct. at 512 (Kennedy, J., concurring). If *Sanjour v. Environmental Protection Agency*, 984 F.2d 434 (D.C.Cir. 1993), stands for a different proposition, or if it too confuses the merits with standing and ignores the differences between facial attacks based on the First Amendment and those based on other constitutional provisions, it warrants reconsideration.

SENTELLE, Circuit Judge, dissenting:

Although I share my colleagues' concerns that this statute may not be the best conceivable vehicle for achieving the underlying congressional aim, I dissent from their conclusion that it is unconstitutional. My dissent rests both on concerns about the precedent the Court creates today and on what I perceive to be its inconsistency with existing precedent, both of the Supreme Court and this Circuit.

I address first the inconsistency of the Court's holding today with existing law on facial challenges; second, the application of the *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), standard to the question of the constitutionality of the honorarium ban; and, third, my discreet disagreement with the "severance" exercised by the majority on the statutory term "officer or employee."

I.

I fear that the majority opinion may lead litigants to conclude that whenever a statute is unconstitutional "as applied" to parties before the court it is also "facially" invalid. *See* Majority Opinion ("Maj. Op.") at 1275 & n. 3 (sustaining appellees' facial challenge because the statute is unconstitutionally overbroad as to them and "the [Supreme] Court allows facial overinclusiveness claims by parties whose conduct may well be constitutionally protect"). In fact, though it is often the case, as in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), for example, that a plaintiff who asserts the unconstitutionality of a statute as applied to him is also heard to challenge the statute on its face, *see Sanjour v. EPA*, 984 F.2d 434, 444 n. 10 (D.C.Cir. 1993); *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 288 (D.C.Cir. 1993), that truism does *not* mean that facial challenges may be entertained and sustained without limitation.

Instead, the Supreme Court has held that statutes may be facially invalidated only in two "narrow" circumstances. As the Court in *New York State Club Ass'n v. New York City*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988), recently made clear:

> Although such facial challenges are sometimes permissible and often have been entertained, . . . to prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties."

Id. at 11, 108 S.Ct. at 2233 (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772 (1984)).

New York State Club Ass'n also teaches that different substantive criteria govern each of the two categories of permissible facial challenges. "[T]he first kind of facial challenge will not succeed unless the court finds that '*every* application of the statute create[s] an impermissible risk of suppression of

ideas.' " *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 798 n. 15, 104 S.Ct. at 2125 n. 15). On the other hand, "the second kind of facial challenge will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. at 2126). Neither type of facial challenge, however, succeeeds unless "there is no care of easily identifiable and constitutionally proscribable conduct that the [challenged] statute prohibits." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66, 104 S.Ct. 2839, 2851-52, 81 L.Ed.2d 786 (1984); *see also Sanjour v. EPA*, 984 F.2d 434, 444 & n. 11 (D.C.Cir. 1993) (same).

Limiting facial challenges in this manner may seem to manifest an excessive focus on semantics or an outright hostility to constitutional rights. But, as the Supreme Court has explained, the limits on permissible facial challenges "rest on more than the fussiness of judges." *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973). They are, quite simply, a requirement of the limitations inherent in Article III. "[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 611, 93 S.Ct. at 2915 (citing *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971)). Stated differently, "[t]he judicial power does not extend to issuing 'an opinion advising what the law would be upon a hypothetical state of facts.' " *American Library Ass'n v. Barr*, 956 F.2d 1178, 1189 (D.C.Cir. 1992) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)).

Moreover, far from disadvantaging constitutional rights, these limits reflect a sensible accommodation of constitutional rights and the legitimate interest of government. Generally

speaking, the Supreme Court has deemed as-applied challenges sufficient to protect precious constitutional rights. *See Broadrick*, 413 U.S. at 611, 93 S.Ct. at 2915. If a plaintiff demonstrates that a law impermissibly encroaches on protected activities, courts "invalidate[ ] the statute, not *in toto*, but only as applied to those activities," and thereby "[t]he law is refined by preventing improper applications on a case-by-case basis." *Munson*, 467 U.S. at 977, 104 S.Ct. at 2857 (Rehnquist, J., dissenting). That approach, in sharp contrast to facial invalidation, has the advantage of allowing statutes to stand as to the legitimate objects of legislative action while simultaneously exempting constitutionally protected activity from the statutes' reach. *Id.*

Only in two circumstances, representing the two exceptions elucidated in *New York State Club Ass'n*, has the Supreme Court found no justification for limiting plaintiffs to as-applied challenges. The first is review of a statute that has no constitutional application. Allowing facial challenges in that situation rests on the sound notion that "there is no reason to limit challenges to case-by-case 'as-applied' challenges when the statute . . . in all of its applications falls far short of constitutional demands." *Munson*, 467 U.S. at 966 n. 13, 104 S.Ct. at 2852 n. 13. The second arises when a statute is so overbroad as to the rights of absent third parties that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Id.* at 965-66 n. 13, 104 S.Ct. at 2851-52 n. 13; *see also id.* at 964-65, 104 S.Ct. at 2850-51. In such a situation, as-applied challenges have been viewed as insufficient to protect First Amendment rights because such a law's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S.Ct. at 2915.

In view of the existing precedent, a lower court addressing a facial challenge based on insufficient tailoring can hardly

avoid distinguishing between the two types of facial challenges.[1] In my view, the present challenge fits neither category, and that forecloses us from striking down the honorarium ban on its face. Quite clearly, appellees' facial challenge cannot succeed as a claim that the honorarium ban is unconstitutional in all of its possible applications. As the majority states, "[n]o party here has argued that § 501(b) is unconstitutional as applied to members of Congress, officers or employees of Congress, or judicial officers or employees." Maj. Op. at 1278. Indeed, appellees' brief expressly disclaims any claim that the ban is unconstitutional as to all those affected: "Plain-

[1] It is true that the Supreme Court has occasionally entertained facial challenges based on lack of tailoring without distinguishing between the two types of facial challenges. *See, e.g., Simon & Schuster v. Members of the New York State Crime Victims Bd.*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (sustaining facial challenge to New York's "Son of Sam" law as not narrowly tailored); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (upholding as narrowly tailored, and therefore rejecting facial challenge to, Michigan's statutory limitation on corporate contributions to candidates for state office). In some of these cases it was unnecessary for the Court to make that distinction; for example, the Court's conclusion in *Austin* that the challenged statute was narrowly tailored rendered the precise nature of the plaintiffs' facial challenge academic.

Admittedly, in other tailoring cases where the precise nature of the facial challenge was unclear, the Court failed to reconcile its decisions with the *New York State Club Ass'n* framework. That fact, however, does not give us license to ignore that framework. *See Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 896 (D.C.Cir. 1992) (harmonizing conflicting lines of Supreme Court cases even though cases in each line sometimes ignored the other line), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 13, 1993) (No. 92-1190). Certainly, prior decisions of this Court have taken pains to distinguish between the two types of facial challenges. *See, e.g., Sanjour v. EPA*, 984 F.2d 434, 440 (D.C.Cir. 1993); *Federal Election Comm'n v. International Funding Inst., Inc.*, 969 F.2d 1110, 1118 (D.C.Cir. 1992) (*en banc*), *cert. denied*, ___ U.S. ___, 113 S.Ct. 605, 121 L.Ed.2d 540 (1992); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C.Cir. 1992).

tiffs are career executive branch employees, and they express no opinion as to the constitutionality of the honoraria ban as applied to Members of Congress, the judiciary, and high-level political appointees in the executive branch." Appellees' Br. at 36 n. 21.

Nor, for two reasons, does the appellees' facial challenge fall within the second category of permissible facial challenges. First, appellees' tailoring challenge does not constitute a cognizable overbreadth challenge under the second type of facial challenge. A court "may not apply overbreadth analysis to a claim 'that [a] statute is overbroad precisely because it applies to him—the plaintiff who is before us.' " *Sanjour*, 984 F.2d at 443 (quoting *Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir.), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989)). In so holding, *Sanjour* gave effect to the Supreme Court's explicit holding that "the second kind of facial challenge will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections *of parties not before the Court.*' " *New York State Club Ass'n v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988) (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984)) (emphasis added).[2]

[2] The following exchange at oral argument between counsel for NTEU and one of my colleagues in the majority is relevant in this regard:

> THE COURT: What I find odd is—you are making an "overbreadth" challenge—
>
> COUNSEL: Sure, both overbreadth and as-applied.
>
> THE COURT: With respect to your overbreadth challenge, you want to make it, "it's overbroad as applied to us." . . . You don't want to argue about anyone else, which is an odd, odd [kind of overbreadth challenge]. . . . Is there any case that you know of, any Supreme Court or court of appeals case, where you have a restricted class making an overbreadth challenge only with respect to them?

Here, appellees do not argue that the honorarium ban will compromise the rights of *absent* third parties. The parties whose rights are being asserted—Executive Branch employees below GS-16 and the individually named plaintiffs—*are* before the Court.[3] The District Court properly certified appellee NTEU to represent the class in question under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Given the nature of a class action, all of the members of the class—not just the class representative—are before the Court. *See* FED.R.CIV.P. 23(c)(3) (providing that "[t]he judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, *shall include* . . . members of the class") (emphasis added); *see generally* 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789, at 247 (1986) (explaining that "a member of the class in a Rule 23 suit is considered to be a party in representation, and will be bound to the same extent as an actual party").[4] Conse-

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COUNSEL: I can't think of one off the top of my head.

Tr. of Oral Arg. (Nov. 6, 1992). Counsel's inability to think of such a case is no accident, in view of the precedents discussed in the text.

[3] The plaintiffs appearing individually and asserting their own rights are: (1) Peter G. Crane; (2) National Treasury Employees Union ("NTEU") Chapter 143; (3) David E. Hubler; (4) the American Federation of Government Employees, AFL-CIO ("AFGE"); (5) Richard Deutsch; (6) Charles Fager; (7) William H. Feyer; (8) Robert Gordon; (9) Judith L. Hanna; (10) George J. Jackson; (110 Eduard Mark; (12) Arnold A. Putnam; (13) Jan Adams Grant; and (14) Thomas C. Fishell. Each of the individually named plaintiffs filed suits in their own behalf and thus are obviously before us.

[4] "The obvious implication of Rule 23(c)(3) is that anyone properly listed in the judgment should be bound by it absent some special reason for not doing so." 7B CHARLES A. WRIGHT ET AL., *supra*, at 244; *see also, e.g., Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367, 41 S.Ct. 338, 342, 65 L.Ed. 673 (1921) (stating that "[i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented").

quently, we have before us, not just the individually named plaintiffs, but *all* Executive Branch employees below GS-16.

At no time in this litigation have the rights of anyone other than the individually named plaintiffs and the certified class been asserted. As a result, appellees' "overbreadth" challenge is based exclusively on a claim that the honorarium ban is overbroad precisely because it applies to them, and the instant case involves the assertion of first-party rights of parties presently before the Court. Appellees' facial challenge, therefore, fails on the merits, in view of controlling precedent from the Supreme Court and this circuit which place cases such as this one outside the substantive bounds of the second type of facial challenge, *i.e.*, the First Amendment overbreadth doctrine. *See New York State Club Ass'n v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988) (holding that a claim under the First Amendment overbreadth doctrine "will not succeed unless . . . the [challenged] statute itself will significantly compromise recognized First Amendment protections of parties not before the Court"); *Sanjour v. EPA*, 984 F.2d at 442 (D.C.Cir. 1993) (same); *see also Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir.) (same), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989). By applying the overbreadth doctrine to appellees' facial challenge, the majority has loosed the overbreadth doctrine from its moorings, in direct contravention of the Supreme Court's pointed admonition that "[t]he scope of the First Amendment overbreadth doctrine . . . must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted." *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982).

Second, under *Sanjour v. EPA*, 984 F.2d 434 (D.C.Cir. 1993), and the cases on which it relied,[5] facial invalidation is

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[5] *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965, 104 S.Ct. 2839, 2851, 81 L.Ed.2d 786 (1984); *New York v. Ferber*, 458 U.S. 747, 770 n. 25, 102 S.Ct. 3348, 3361 n. 25, 73

proper under the second type of facial challenge only if "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Id.* at 444 & n. 11 (internal quotation marks omitted). Not only have appellees failed to make that showing, the majority correctly holds that the honorarium ban *is* constitutional as to Congress and the judicial branch, *see* Maj. Op. at 1278, and concedes that "for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality." *Id.* at 1274.

Although the fact that the ban has constitutionally permissible applications does not mean that the ban is narrowly tailored, *see Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989), it does necessarily mean that the statute may not be invalidated on its face, assuming the constitutionally permissible applications are "easily identifiable."[6] *See, e.g., Secretary of State of*

L.Ed.2d 1113 (1982); *United States Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2897-98, 37 L.Ed.2d 796 (1973); *Moore v. City of Kilgore*, 877 F.2d 364, 391 (5th Cir.), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989).

[6] The majority confuses the inquiry into the relative number of constitutional applications a challenged statute has, for the analytically distinct purposes of deciding whether a statute is narrowly tailored and, if not, whether it is facially invalid. *See* Maj. Op. at 1276 n. 4 (stating that "[t]he presence of some permissible applications of the [honorarium] statute that are 'easily identifiable' does not immunize a statute from facial invalidation" in cases where, as here, "the scope of the invalid applications is large"). As stated in the text, I agree that if a statute has a comparatively large number of unconstitutional applications, the statute is not narrowly tailored under *Ward*. However, under the majority's analysis, *any* statute that is not narrowly tailored is facially invalid. With this I cannot agree. Contrary to the majority's conclusion, a statute *can* be overbroad (*i.e.*, not narrowly tailored) yet facially constitutional. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-05, 105 S.Ct. 2794, 2800-02, 86 L.Ed.2d 394 (1985) (obscenity statute held not narrowly tailored yet facially constitutional); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (same as to statute

Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965, 104 S.Ct. 2839, 2851, 81 L.Ed.2d 786 (1984); *New York v. Ferber*, 458 U.S. 747, 770 n. 25, 102 S.Ct. 3348, 3361 n. 25, 73 L.Ed.2d 1113 (1982); *United States Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2897-98, 37 L.Ed.2d 796 (1973). Here, the honorarium ban does have an easily identifiable core of constitutional application—at the very least, it may constitutionally be applied to judges and their staff and Members of Congress and their staff. *See* Maj. Op. at 1279. Thus, the ban cannot be invalidated on its face consistently with the above cases.

For the foregoing reasons, sustaining appellees' facial challenge runs counter to the mandate of several Supreme Court cases. *See New York State Club Ass'n v. New York City*,

banning demonstrations on the Supreme Court grounds); *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (same as to statute banning solicitation by attorneys); *Moore v. City of Kilgore*, 877 F.2d 364, 390-93 (5th Cir. 1989) (same as to restriction on municipal fire-fighters' speech).

As the Supreme Court has held, when a statute is not narrowly tailored but nonetheless does have a "*core* of easily identifiable and constitutionally proscribable conduct," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n. 13, 104 S.Ct. 2839, 2852 n. 13, 81 L.Ed.2d 786 (1984) (emphasis added), "the Court has required a litigant to demonstrate that the statute 'as applied' to him is unconstitutional." *Id.* at 976, 104 S.Ct. at 2857 (citing cases); *see also Brockett*, 472 U.S. at 504, 105 S.Ct. at 2802 (overbroad statutes are not to be facially invalidated under the first exception to the rule against facial challenges unless "the identified overbreadth is incurable and would taint all possible applications of the statute"). Indeed, this Circuit has recently held that *Munson* must be given full effect, not an unduly narrow and crabbed reading, such as the majority's. *See Sanjour v. EPA*, 984 F.2d 434, 444 (D.C.Cir. 1993) (under *Munson* a plaintiff challenging a statute's tailoring in all possible applications "must carry the heavy burden of showing that the challenged statute or regulation is not narrowly tailored and that there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits") (internal quotation marks omitted).

487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65, 967 n. 13, 104 S.Ct. 2839, 2850-51, 2852 n. 13, 81 L.Ed.2d 786 (1984); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984); *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982). It also runs counter to this Circuit's decision in *Sanjour v. EPA*, 984 F.2d 434 (D.C.Cir. 1993). Further, it creates a conflict with the Fifth Circuit. *See Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir.), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989). "Believing that in this case the overbreadth doctrine is not merely 'strong medicine,' but 'bad medicine,' " *Munson*, 467 U.S. at 975, 104 S.Ct. at 2856 (Rehnquist, J., dissenting) (citation omitted), I cannot join the majority's facial invalidation of the honorarium ban.

II.

I agree with the majority that *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), is the standard by which the constitutionality of the honorarium ban must be judged. Under the *Pickering* test, we must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734.

I differ from the majority as to both sides of the balance. On the one hand, I find the burden the honorarium ban imposes on appellees' First Amendment rights lighter than the majority perceives; the weight of the government's interest in avoiding the appearance of impropriety or corruption, I find much, much greater.

A. *The Employees' Interest*

The majority holds, correctly, that financial disincentives on speech do burden First Amendment rights and the fact that such disincentives do not prohibit expressive activity only affects the weight of the burden. *See* Maj. Op. at 1273. This Court recently held as much. *See Sanjour v. EPA*, 984 F.2d 434, 441 (D.C.Cir. 1993) (holding that financial disincentives on speech burden First Amendment rights for purposes of the *Pickering* balance). I find the majority's conclusion as to the effect of that holding on the present controversy inconsistent with Circuit precedent.

In *Sanjour* this Court addressed the constitutionality of a financial disincentive on speech that closely resembles the honorarium ban in certain respects. There, the Environmental Protection Agency ("EPA") issued an Ethics Advisory allowing employees to accept expense reimbursement from nonfederal sources if they spoke "officially"—that is, on behalf of the agency—but not "unofficially." The plaintiffs in *Sanjour* claimed that the Ethics Advisory all but eliminated their ability to engage in expressive activity, given that they, as federal employees, generally are of modest means. Indeed, the dissent in *Sanjour* took the argument one step further, arguing that the Advisory "would apply even if the employee *loses* income because he has taken uncompensated leave to give the speech." *Sanjour*, 984 F.2d 434, 456 n. 6 (Wald, J.).

In spite of those considerations, *Sanjour* rejected the plaintiffs' contention that the Ethics Advisory "imposes a severe burden on the First Amendment rights of EPA employees" and held that the burden was "moderate, though not insignificant." *Sanjour*, at 441. In so ruling, *Sanjour* stressed that the Advisory "allows [employees] to speak whenever and on whatever topics they choose." *Id.* at 440.

Given the decision in *Sanjour*, we cannot consistently hold that the honorarium ban imposes more than a moderate burden

at most on appellees' First Amendment rights.[7] Like the EPA Ethics Advisory, the honorarium ban does not prohibit speech, as even the majority is constrained to concede. *See* Maj. Op. at 1273. Moreover, the ban imposes *significantly* less of a burden on appellees' First Amendment rights than did the Ethics Advisory upheld in *Sanjour*. Unlike the Ethics Advisory, the ban allows employees to recover all of the costs they necessarily incur in expressive activity. The ban only prevents employees from *profiting* from their outside activities.

As then-Judge Thomas wrote for the Court in our prior decision in this case:

> Many of the [employees] state that they cannot afford to pay the expenses they incur in connection with their First Amendment activities. The ban does not preclude them from recovering these costs, however. The Act and the OGE regulations expressly exclude "actual and necessary travel expenses" from the definition of an honorarium. *An employee need not receive a direct reimbursement to recover his travel costs; he complies with the honorarium ban as long as he does not earn income for his speaking and writing* in excess of his actual and necessary travel expenses. The regulations also exclude from the honoriarum ban "[a]ctual expenses in the nature of typing, editing and reproduction costs," and "[m]eals or other incidents of attendance, such as a waiver of attendance fees or course materials furnished as part of the event at which an appearance or speech is made." *Fairly read, these provisions encompass all of the necessary expenses that the [employees] incur.*

[7] The degree of inconsistency between the majority's decision and *Sanjour* should not be misunderstood: As previously explained, *Sanjour* forecloses the majority from striking down the honorarium ban on its face, *see supra* pp. 1282-85, and as I explain in the text, *Sanjour* practically dictates the conclusion that the honorarium ban only moderately burdens appellees' First Amendment rights. Furthermore, as I explain in a later section of this dissent, *Sanjour* rejected the demand for objective evidence of harm to the government's compelling interest in avoiding the appearance or actuality of impropriety in the federal workforce and held that courts must defer to the government's determination that a proscribed practice will harm that government interest. *See infra* at pp. 1288-89. The law of this Circuit, whether in error or not, is binding absent correction by a higher court. *See Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 49 (D.C.Cir. 1987) ("[w]hether or not [a prior case's] position on this point is correct . . . this panel is bound by that position as the law of the circuit"), *vacated in part on other grounds*, 857 F.2d 1516 (D.C.Cir. 1988).

National Treasury Employees Union v. United States, 927 F.2d 1253, 1255 (D.C.Cir. 1991) (emphasis added) (citations omitted). Appellees thus are entirely off the mark in their contention that the honorarium ban "severely handicaps the ability of all but the independently wealthy to seriously pursue writing and speaking activities." Appellees' Br. at 22.

There are, of course, two senses in which NTEU's assertion that the honorarium ban severely burdens free speech rights is theoretically correct, but nonetheless unavailing. First, it may be argued that because appellees' conduct enjoys First Amendment protection, any burden on those rights is necessarily severe for *Pickering* purposes. *See* Maj. Op. at 1273-74 (failing to specify the particular weight of the employee's side of the balance). That assumption places the analytical cart before the horse: "[C]onduct of government employees is 'protected' when, *after* balancing the interests of employee and employer, it is concluded that the employee's interest in speech outweighs the government's interest as an employer in efficient management." *Foster v. Ripley*, 645 F.2d 1142, 1148 (D.C.Cir. 1981). Moreover, such an absolutist approach to the employee's side of the balance would be inconsistent with the Supreme Court's directive that "[t]he problem in any case is to arrive at a balance between" the competing interests

Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Assuming that any burden on free speech rights is severe renders *Pickering* a balancing test in name only.

Second, the honorarium ban might be said to be severe in its effect on appellees' rights to the extent they depend on honoraria to pay their bills. There is evidence in the record suggesting that at least some Executive Branch employees below GS-16 are financially dependent on the income they have received for their expressive activity. *See, e.g.*, Affidavit of John C. Shelton ¶ 8, at 2 (stating that "based on my current financial situation, I will not be able to continue making payments on my mortgage if I have to give up the income from my writing"). However, to the extent that appellees may be financially dependent on honoraria, the weight of the government interest in avoiding the appearance of impropriety or corruption is greatly bolstered. *See infra* p. 1292.

In view of the foregoing, the honorarium ban only has a moderate impact on appellees' First Amendment rights. *See generally Snepp v. United States*, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam) (holding that the Central Intelligence Agency could, consistent with the First Amendment, impose a constructive trust denying a former employee the proceeds from expressive activity that harmed a substantial government interest). To the extent the majority accords the employees' side of the balance greater weight, I disagree.

B. ***The Government's Interest***

The majority concedes that the government has a "strong" interest in avoiding the appearance of impropriety or corruption in the public service. Maj. Op. at 1274. I would style the identified government interests "*compelling.*" *See Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S.

197, 208, 103 S.Ct. 552, 559, 74 L.Ed.2d 364 (1982); *Buckley v. Valeo*, 424 U.S. 1, 26-29, 96 S.Ct. 612, 638-39, 46 L.Ed.2d 659 (1976) (per curiam). The majority holds that interest sufficiently heavy "to outweigh government employees' interest in engaging in speech for compensation where the compensation creates . . . an appearance [of impropriety]." Maj. Op. at 1274 (emphasis omitted). However, the majority concludes that this balancing "will not save section 501(b) . . . if it is either 'overbroad' or manifests a want of 'narrow tailoring.'" *Id.* at 1274. The majority thereafter rejects the result of the *Pickering* balance insofar as the statute applies beyond Members of Congress, officers and employees of Congress, judicial officers and judicial employees. Apparently, the majority does not find the appearance-of-impropriety weight to sit on the government side of the balance in any other cases. I do not find the majority's justifications for rejecting the applicability of its initial *Pickering* balancing to Executive Branch officers and employees to be convincing.

First, perceiving a lack of legislative or record evidence supporting the legislative premise that accepting honoraria may give rise to an appearance of impropriety or corruption, the majority dismisses as "hypothetical" the risk of either appearance in this case. Maj. Op. at 1276-77. Second, the majority argues that honoraria cannot give rise to an appearance of impropriety or corruption, unless (1) the payor has a conflict of interest with the employee's employing agency or (2) the subject matter of the employee's expressive activity bears a nexus with the employee's government job. I address each of these arguments below.

1. ***The Majority's Evdience Requirement***

The majority argues that the honorarium ban must be deemed not to advance the asserted government interest because "[t]he government points neither to improprieties in the pre-§ 501(b)

era that would have been prevented by § 501(b) but not by the prior regulations, nor to any serious enforcement or line-drawing costs associated with those regulations." Maj. Op. at 1276. For two reasons, the majority's reasoning does not justify its results.

In the first place, I do not agree that the government was required to point to specific evidence of the ill effects of honoraria in the Executive Branch. It is true, as the majority points out, that in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Court refused to consider the defendant's argument that corporate advocacy of political causes would undermine the democratic process, on the ground that the defendant's claim was not "supported by record or legislative findings." *Id.* at 789, 98 S.Ct. at 1422. However, the Supreme Court has restricted *Bellotti*'s demand for such findings to cases where the rights being asserted are "[r]rights of political expression and association." *In re Primus*, 436 U.S. 412, 434 n. 27, 98 S.Ct. 1893, 1906 n. 27, 56 L.Ed.2d 417 (1978).[8]

Here, while appellees' expressive activities may pertain to matters of public concern, *see* Maj. Op. at 1273, they do not involve *political* expression. Appellees have written or spoken about art, Russian history, movies, plays and other interesting topics not remotely involving politics.[9] *See id.* at 1275. There-

[8] Limiting the requirement for explicit legislative or record evidence to political expression or association, as *In re Primus* did, is not unreasonable because political speech in particular "occupies the highest rung on the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983) (internal quotation marks omitted). Even in that context, though, one might question a requirement for findings because, in any event, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543, 56 L.Ed.2d 1 (1978).

[9] This fact distinguishes this case from *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) ("*NCPAC*"). The statute struck down in *NCPAC* imposed a $1,000 limit on campaign expenditures by "political committees" for presidential and vice-presidential candidates receiving federal campaign funding. Given that campaign expenditures implicate political speech and association, *id.* at 493-94, 105 S.Ct. at 1466-67, it was altogether proper, under *Bellotti* and *In re Primus*, to require greater proof of harm to the relevant governmental interest and to reject a vague assertion of harm that was only "hypothetically possible." *Id.*, 470 U.S. at 498, 105 S.Ct. at 1469. Again, here we do not face political speech or association, and the possibility of harm is quite specific and quite real. *See infra* at 1289-90.

fore, the mere fact that the government adduced no record or legislative evidence of Executive Branch improprieties does not justify according no weight to the governmental interests underlying the honorarium ban.[10]

Long before *Bellotti*, the Supreme Court made clear that "[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. 75, 101,

[10] Indeed, requiring such proof of the government is inappropriate, given that the honorarium ban is a *prophylactic* rule. Inherent in the very nature of such a rule is the concept that the evil to be avoided has not yet occurred. It follows that it is inappropriate to require evidence of Executive Branch wrongdoing *before* Congress may enact a prophylactic rule against honoraria, and such a requirement is not a result commanded by the Constitution. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) (upholding prophylactic limitations on campaign contributions); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880,. 37 L.Ed.2d 796 (1973) (upholding Hatch Act's prophylactic ban on political activities and speech of government employees), *reaff'g United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). "Neither we nor the Supreme Court have held that in a *Pickering* case, the Government must prove that a regulation on speech overlaps with the threatened harm to the governmental interest at stake with mathematical precision." *Sanjour v. EPA*, 984 F.2d 434, 447 (D.C.Cir. 1993).

67 S.Ct. 556, 570, 91 L.Ed. 754 (1947). Later, with the full development of *Pickering* cases into a discrete area of First Amendment law, the Supreme Court reinforced *United Public Worker*'s holding. In 1983, the Court ruled that a governmental employer is not required to "tolerate action which he reasonably believe[s] would" cause the harm against which the prophylactic measure is directed. *Connick v. Myers*, 461 U.S. 138, 154, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983); *see also Sanjour v. EPA*, 984 F.2d 434, 440 (D.C.Cir. 1993) (holding that "employer is not required to tolerate action which it reasonably believed would cause harm") (internal quotation marks and brackets omitted); *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C.Cir. 1991) (same), *vacated in part on other grounds*, 982 F.2d 531 (D.C.Cir. 1992) (en banc). Indeed, we have construed a post-*Connick* Supreme Court case, *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), to allow us to "draw[ ] reasonable inference of harm" from proscribed employee activities and therefore, on that ground, rejected an argument that "objective evidence of concrete harm" is required. *Hall v. Ford*, 856 F.2d 255, 260-61 (D.C.Cir. 1988).

I would hold these standards, rather than *Bellotti*, to be controlling here, and conclude that Congress's determination that only a complete ban on honoraria can effectively avoid the ill effects of honoraria is reasonable. After all, as the record reveals, following a two-year study of Executive Branch agencies' enforcement of prior ethics laws relating to honoraria, the Government Accounting Office ("GAO") concluded that federal ethics enforcement has been consistently impeded by agencies' "overly permissive policies and practices." Report to the Chairman, Senate Subcomm. on Fed. Servs., Post Office and Civil Serv., Comm. on Governmental Affairs, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues*, at 9 (Feb. 1992) ("*GAO Report*").

Further, the OGE's efforts to ensure that ethics laws were more evenly enforced had been far from successful. *See id.* at 2 (reporting that "agencies did not always implement OGE's recommendations"); *see also id.* at 12-13 (same). Because of these failures to enforce ethics regulations, "agencies [had] approved activities that were questionable as to the appropriateness of accepting compensation" from sources outside the federal government. *Id.* at 9. The GAO Report thus supports the reasonableness of Congress's belief that only a comprehensive, categorical ban on honoraria can effectively prevent the problems of evisceration and underenforcement inherent in the prior system of patchwork ethics laws. *See infra* at 1291 (summarizing prior ethics laws).

Moreover, in enacting the ban, Congress had before it evidence that allowing employees in the Executive Branch to accept honoraria can give rise to an appearance of impropriety or corruption. Two separate blue-ribbon commissions, the Quadrennial Salary Commission and the Wilkey Commission, conducted hearings examining the actual or potential impact of allowing federal employees, including Members of Congress, to accept honoraria. Though separate, both commissions reached the same conclusion—accepting honoraria creates an appearance of impropriety that jeopardizes the public's faith in their government and its employees. *See To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform*, at 35, 36 (Mar. 1989) (hereinafter "*Wilkey Commission Report*") (stating that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor" and that "the current ailment [caused by accepting honoraria] is a serious one"); *Fairness for Our Public Servants: Report of the 1989 Commission on Executive, Legislative and Judicial Salaries*, at 24 (Dec. 1988) (hereinafter "*Quadrennial Commission Report*") (con-

cluding that "[t]he potential for abuse or the appearance of abuse is obvious to the public" and that public confidence in the government "is threatened by the steady growth of this practice [honoraria]," particularly in Congress).

Although both commissions relied principally on the congressional experience, which revealed a venerated institution of government appearing corrupt in the eyes of the public by virtue of honoraria, they recognized that what has happened in Congress can happen in the judicial and executive branches. As the Wilkey Commission explained,

> Although we are aware of no special problems associated with the receipt of honoraria within the judiciary, the Commission—in the interest of alleviating abuses within the legislative branch and in applying equitable limitations across the government—joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government.

Wilkey Commission Report, at 35-36. Accordingly, both commissions recommend that honoraria should be completely abolished in all three branches of the federal government. *See id.; Quadrennial Commission Report*, at 24 ("strongly recommend[ing]" that "the practice of honoraria in all three branches be terminated by statute" and that "[t]he prohibition [on honoraria] should be extended to all Congressional and judicial staff").

Given these reports of the Quadrennial and Wilkey Commissions, Congress could reasonably believe that employee acceptance of honoraria can create—and in fact has created—an appearance of impropriety or corruption in the eyes of the public. In my view, given the reasonableness of that legislative premise, we are required to assign the government interest compelling weight in the *Pickering* balance. *See Connick v.*

Myers, 461 U.S. 138, 154, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983); *United Public Workers v. Mitchell*, 330 U.S. 75, 101, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947); *Sanjour v. EPA*, 984 F.2d 434, 440 (D.C.Cir. 1993) (same); *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C.Cir. 1991), *vacated in part on other grounds*, 982 F.2d 531 (D.C.Cir. 1992) (en banc).

Wholly apart from the majority's erroneous refusal to give effect to Congress's reasonable belief that a complete ban on honoraria was necessary, the majority's demand for evidence of honoraria-induced harm in the Executive Branch which was not adequately addressed by prior law presses judicial review beyond its proper law presses judicial review beyond its proper bounds. As the Supreme Court has commanded, courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil to be feared." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210, 103 S.Ct. 552, 561, 74 L.Ed.2d 364 (1982); *see also Buckley v. Valeo*, 424 U.S. 1, 27, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976) (per curiam) (upholding campaign contribution limitations designed to address the real or perceived problem with *quid pro quo* arrangements even though bribery laws and disclosure requirements already dealt with that concern). That is especially so, given that the honorarium ban is but the latest step in Congress's careful adjustment of federal ethics laws. *See National Right to Work Comm.*, 459 U.S. at 209, 103 S.Ct. at 560 (stating that courts owe "considerable deference" to Congress's "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step") (internal quotation marks omitted).

In rejecting Congress's assessment that prior ethics laws were inadequate to avoid honoraria-induced appearances of impropriety, the majority relies on *Boos v. Barry*, 485 U.S. 312, 324-29, 108 S.Ct. 1157, 1165-68, 99 L.Ed.2d 333 (1988), for the proposition that "the 'most useful starting point' for

assessing whether a statute is narrowly tailored is to 'compare it with an analogous statute.' " Maj. Op. at 1276. True, in that decision, the Supreme Court did compare the statute challenged as not narrowly tailored for the asserted governmental interest to an analogous statute (and its legislative history). The challenged statute, enacted in 1938, was sweeping in its reach and, the Court concluded, extended to expressive activities. 485 U.S. at 329, 108 S.Ct. at 1168. In contrast, the statute deemed analogous, which was enacted in 1972, was considerably narrower, in that it contained a provision stating that " '[n]othing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment.' " *Id.* at 325, 108 S.Ct. at 1166 (quoting Pub.L. No. 92-539, § 301(e), 86 Stat. 1073 (1972)). The analogous statute was further narrowed in 1976, when Congress deleted a provision that it felt " 'raise[d] serious Constitutional questions because it appear[ed] to include within its purview conduct and speech protected by the First Amendment.' " *Id.* at 326, 108 S.Ct. at 1166 (quoting S.Rep. No. 1273, 94th Cong., 2d Sess. 8 n. 9 (1976)).

The comparison between the challenged law and the analogous statute, according to the Court, revealed that "Congress has determined that [the challenged statute] adequately satisfies the Government's interest." *Id.* Deferring to that determination by Congress, the Court "conclude[d] that the availability of alternatives such as [the analogous statute] amply demonstrates that the [challenged law] is not crafted with sufficient precision to withstand First Amendment scrutiny." *Id.* at 329, 108 S.Ct. at 1168. *Boos*, then, is simply the flip side of cases such as *National Right to Work Comm.* and supports, rather than undermines, the judicial duty to give considerable deference to Congress's evaluation of the effectiveness of its prior laws. Here, because Congress has concluded that prior law was too narrow to effectuate the relevant government

interests, *National Right to Work Comm.*, the Hatch Act cases and their progeny are the applicable precedents, not *Boos*.

In the case before us, a comparison of the honorarium ban to prior ethics laws unmistakably reveals a congressional determination that only a broad, government-wide ban on honoraria is sufficient to protect against the appearances of impropriety or corruption accepting honoraria creates. Congress at first determined to allow people in all three branches of the federal government to accept honoraria, subject to amount limitations. *See* Pub.L. No. 93-443, § 101(f)(1); 88 Stat. 1268 (1974) (establishing $1,000 cap on honoraria for each covered activity and $15,000 annual cap, both exclusive of actual travel and subsistence expense reimbursement); Pub.L. No. 94-283, § 112(2), 90 Stat. 475, 494 (1976) (raising the individual and annual limits to $2,000 and $25,000, respectively). When Congress determined that these limitations were insufficient to curb actual or perceived abuses in Congress, each House adopted rules drastically restricting Members' ability to accept honoraria, although only the House of Representatives' rule actually went into effect. *See Financial Ethics: Communication from the Chairman, House Committee on Administrative Review*, H.R. Doc. No. 73, 95th Cong., 1st Sess. 9-12 (1977) (setting $750 limit for individual covered activities, as well as rules limiting acceptable outside income and expense reimbursement); *Senate Code of Official Conduct: Report of the Senate Special Committee on Official Conduct*, S.Rep. No. 49, 95th Cong., 1st Sess. 8-9, 37-40 (1977) (adopting similar restrictions as to Senate).

Some classes of congressional and judicial staff completely fell through the cracks of this patchwork of ethics regulations and were able to accept honoraria without limitation. *See Quadrennial Commission Report*, at 24. Even employees who were covered often were able to circumvent the limitations by, for example, receiving approval by their employing agencies

of prohibiting transactions. *See GAO Report* (concluding after survey of Executive Branch enforcement of ethics regulations that improper transactions frequently occur by virtue of law enforcement).

Ultimately, Congress decided to dispense with its step-by-step approach to regulating honoraria, in favor of a uniform, government-wide ban. *See* 5 U.S.C. app. § 501 *et seq.* (1988 Supp. I). Congress made that decision based on two reports recommending that such action was critical to restoring or maintaining public confidence in the propriety of government employees' performance of their public functions. Congress's careful and deliberate approach to addressing the appearance of impropriety caused by employees accepting honoraria, as well as Congress's assessment of the ineffectiveness of prior ethics laws, are entitled to "considerable deference" from this Court. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209, 103 S.Ct. 552, 560, 74 L.Ed.2d 364 (1982). I, therefore, cannot accept the majority's conclusion that there were no "improprieties in the pre-§ 501(b) era that would have been prevented by § 501(b) but not by the prior regulations." Maj. Op. at 1276.

2. *The Majority's Nexus Requirement*

I also cannot accept the majority's proposition that "[t]o create the sort of impropriety or appearance of impropriety at which the statute is evidently aimed, there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor." Maj. Op. at 1275. As *amicus* Common Cause puts it, "a defense contractor can just as easily and just as effectively gain improper influence by paying an honorarium to a Defense Department official to speak about hydrangeas as about hydraulics." *Amicus* Br. at 25. We recognized this in *Sanjour*,

984 F.2d 434, 450 (D.C.Cir. 1993), stating that apart from any payor-payee or subject-matter nexus, "accepting valuable benefits from non-federal sources . . . is the root cause of such an appearance," that is, an appearance of impropriety. All the public sees are employees, entrusted with carrying out the business of the government, receiving substantial payments from entities outside of the government—the public may not pause to consider whether there is a relationship between the payor and payee or the activity for which the honorarium is paid and the payee's job.

Appellees argue that Congress's determination that a complete ban on honoraria was necessary to avoid the feared appearances is of little moment here because the reports on which it relied employed a different definition of honoraria than the honorarium ban does. It is true that both reports define honoraria to "include 'payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-government group.'" *Wilkey Commission Report*, at 35 (quoting *Quadrennial Commission Report*, at 24), whereas Congress defined "honorarium," in pertinent part, as "a payment of money or any thing of value for an appearance, speech or article . . . by a Member [of Congress], officer or employee, excluding any actual and necessary travel expenses incurred by such individual." 5 U.S.C. app. § 505(3). That, however, is a distinction without a difference, for present purposes.

The issue here is whether a nexus is necessary for accepting honoraria to give rise to an appearance of impropriety or corruption, and on that issue, the definitions the statute and the reports utilize are in unison. Neither report defined honorarium to require the sort of nexus the majority describes. Indeed, the Wilkey Commission explained that "[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the ban on honoraria *necessarily* needs to extend

both to activities related to an individual's official duties and to other activities." *Wilkey Commission Report,* at 36 (emphasis added). In addition, the Quadrennial Commission reported to Congress that "honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; *or any other benefit that is the substantial equivalent of an honorarium.*" *Quadrennial Commission Report,* at 24 (emphasis added). Therefore, Congress's determination that appearances of impropriety can result from accepting honoraria for speeches or writings lacking a subject-matter or payor-payee nexus is reasonable.

3. *Narrow Tailoring and the* Pickering *Balance*

Based on the discussion above, I would hold that the honorarium ban is sufficiently narrowly tailored to survive facial challenge.[11] The Supreme Court has stated that " '[a] complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil.' " *Ward,* 491 U.S. at 800, 109 S.Ct. at 2758 (quoting *Frisby v. Schultz,* 487 U.S. 474, 485, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988)). So it is here.

[11] I agree with the majority, however, that the more lenient tailoring requirement described in *Ward v. Rock Against Racism,* 491 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989), applies to content-neutral restrictions on speech, such as the honorarium ban. *See* Maj. Op. at 1274. I believe the Court should explicitly acknowledge that the *Ward* definition supersedes this Circuit's more stringent prior definition, which demanded that even content-neutral restrictions "be narrowly drawn to restrict speech no more than is necessary to protect a substantial governmental interest." *McGehee v. Casey,* 718 F.2d 1137, 1143 (D.C.Cir. 1983) (brackets and internal quotation marks omitted).

Here, it was appropriate to "target" employee acceptance of honoraria without a direct job nexus. First, as we have held, "accepting valuable benefits from non-federal sources . . . is the root cause" of an appearance of impropriety or corruption. *Sanjour v. EPA,* 984 F.2d 434, 450 (D.C.Cir. 1993). Second, based on the history of federal enforcement of honoraria regulations since Watergate, Congress could conclude that anything short of a complete ban on honoraria will allow employees to circumvent, advertently or otherwise, rules relating to honoraria. *See GAO Report,* at 9; *Wilkey Commission Report,* at 36; *Quadrennial Commission Report,* at 24. Although it might have been wise to allow the acceptance of honoraria in the absence of a nexus of the type the majority imposes, I cannot help but conclude that the honorarium ban is sufficiently tailored in the constitutional sense.

In fact, the conclusion that the honorarium ban is narrowly tailored follows from *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), and the Supreme Court cases upholding the Hatch Act, 5 U.S.C. § 7324 *et seq.* (1988), *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed.754 (1947).[12] In *Buckley* the Supreme Court upheld statutory limits on campaign contributions to candidates for federal elective office yet struck down independent campaign expenditure limitations. Both limitations were justified in part as prophylactic measures reasonably necessary

[12] The Supreme Court has read these cases to stand for the broad proposition that government employees may "act[ ] to protect substantial governmental interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Snepp v. United States,* 444 U.S. at 509 n. 3, 100 S.Ct. at 765 n. 3 (upholding restriction denying employees the right to profit from expressive activity that harms a substantial government interest).

to avoiding corruption or an appearance of corruption.

In upholding the contribution limitations, the Supreme Court emphasized that the feared appearance arose from the fact that the candidates who receive "large contributions" receive valuable benefits, "increasing[ly] importan[t] . . . to effective campaigning," which may be given "to secure a political *quid pro quo*." 424 U.S. at 26, 95 S.Ct. at 638. Such an appearnce did not arise from independent campaign expenditures—that is, expenditures by entities independent from a political campaign that were not coordinated with any campaign—because the candidate received no perceptible benefit from the expenditure. *Id.* at 47, 96 S.Ct. at 648 (stating that "[u]nlike [campaign] contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"). It mattered not to the Court, in upholding the statutory campaign contribution limits, that preexisting statutes prohibited such corrupt exchanges and required disclosure of large campaign contributions: "Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28, 96 S.Ct. at 639.

There can be little question that the honorarium ban is more analogous to the contribution limitations upheld in *Buckley* than to the expenditure limitations invalidated therein. Honoraria, by definition, is a valuable benefit to the federal employee; it goes beyond expense reimbursement and constitutes income—a net financial gain. *See National Treasury Employees Union v. United States*, 927 F.2d 1253, 1255 (D.C.Cir. 1991). Even a modest honorarium can often approach or exceed an employee's weekly salary, *see, e.g.*, Affidavit of David E. Hubler ¶ 4, at 2 (stating that he earned "$500 to $1,500 per article" as honoraria); Affidavit of Richard Deutsch

¶ 10, at 3 (stating that he had been offered $3,000 to write a magazine article), and is sufficiently great to create financial dependency on the honoraria. *See, e.g.*, Affidavit of John C. Shelton ¶ 8, at 2 (stating that "based on my current financial situation, I will not be able to continue making payments on my mortgage if I have to give up the income from my writing"). Just as the receipt of a valuable benefit by one who may be financially dependent thereon was held to create an appearance of corruption in *Buckley*, *see* 424 U.S. at 26, 96 S.Ct. at 638, so the acceptance of honoraria—cash in excess of necessary costs—by federal employees creates an appearance of impropriety or corruption.

In the Hatch Act cases, on which the Court in *Buckley* relied in sustaining the campaign contribution limits, the Court upheld the Hatch Act's sweeping restrictions on the off-duty political activities of federal employees. *See United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). The Hatch Act forbids federal employees from "tak[ing] an active part in political management or in political campaigns," but allows employees to vote and to express their political opinions. 5 U.S.C. § 7324(a)(2) (1988). In *United Public Workers*, the Court held that the proscribed political activity was "reasonably deemed by Congress to interfere with the efficiency of the public service," which, the Court stressed, was all that was necessary to sustain its constitutionality. 330 U.S. at 101, 67 S.Ct. at 570.

The Court "unhesitatingly reaffirm[ed]" that conclusion almost three decades later, in *Letter Carriers*, 413 U.S. at 556, 93 S.Ct. at 2886. There the Court ruled that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the

system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565, 93 S.Ct. at 2890. The Court held that Congress's determination that even off-duty political activity by federal employees threatened public confidence in the impartiality of public employees was reasonable, in that it rested on "the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that . . . the political influence of federal employees on others and on the electoral process should be limited." *Id.* at 557, 93 S.Ct. at 2886. Neither the absence of legislative or record evidence substantiating the congressional determination nor the presence of preexisting laws addressing the evils that flow from a politicized federal workforce prevented the Court from counting the asserted government interest in the *Pickering* balance.[13] *Id.* 413 U.S. at 564-67, 93 S.Ct. at 2889-91.

Here, just as in the Hatch Act cases, Congress relied on the judgment of history in enacting the honorarium ban. That history reveals several facts that support the reasonableness of Congress's determination that honoraria must be banned from the federal government. First, honoraria undermine public confidence in government by creating an appearance of impropriety or corruption. *Wilkey Commission Report,* at 35, 36

[13] The majority's attempted distinction of the Hatch Act cases—that there, because "[t]he potential for such subtle [political] pressure is not only pervasive but inherently difficult to demonstrate or assess . . . the absence of episodes coming to light is quite consistent with the congressional concern" and no evidence was necessary, Maj. Op. at 1277—is unavailing. The congressional motivation for the Hatch Act was to achieve a federal workforce actually and perceived to be free of political influence. *See Letter Carriers,* 413 U.S. at 565, 93 S.Ct. at 2890 (referring to avoiding these congressional concerns as a "major thesis of the Hatch Act"). The predominant motivation for the Hatch Act mirrors Congress's present desire to avoid the actuality or appearance of impropriety that employees' accepting honoraria can cause.

(stating that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor" and that "the current ailment [caused by accepting honoraria] is a serious one"); *Quadrennial Commission Report,* at 24 (concluding that "[t]he potential for abuse or the appearance of abuse is obvious to the public" and that public confidence in the government "is threatened by the steady growth of this practice [honoraria]," particularly in Congress).

Second, only a uniform, government-wide ban will prevent determined federal employees from attempting to supplement their salaries by exploiting loopholes in ethics laws. *See GAO Report,* at 9 (concluding from the survey of Executive Branch enforcement of prior ethics laws that federal ethics enforcement has been impeded by agencies' "overly permissive policies and practices"); *see also Wilkey Commission Report,* at 36 (explaining that "[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the ban on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities"); *Quadrennial Commission Report,* at 24 (concluding that "honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium"). The conclusion that the honorarium ban is narrowly tailored under *Ward,* in sum, is all but dictated by the Supreme Court's decisions in *United Public Workers* and *Letter Carriers,* not to mention *Buckley.*

In view of my conclusion that the ban is narrowly tailored under *Ward,* it follows that the *Pickering* balance favors the honorarium ban. The ban imposes at most only a moderate burden on First Amendment rights because it allows appellees

to engage in covered activities whenever and on whatever topics they choose and to accept reimbursement for all expenses they necessarily incur in doing so. At the same time, the ban fully effectuates the compelling government in avoiding the appearance of impropriety that allowing employees to accept honoraria causes, an interest Congress reasonably believed is harmed by tolerating honoraria. As a consequence, I would hold the honorarium ban constitutional under *Pickering*.

III.

I also find unacceptable the majority's mode of severance. The majority limits its holding by "strik[ing] 'officer or employee' from § 501(b) *except* in so far as those terms encompass [M]embers of Congress, officers and employees of Congress, judicial officers and judicial employees," Maj. Op. at 1279, treating its redefinition of "officer or employee" as "a proper form of severance." *Id.* I do not believe this is consistent with controlling precedent on the subject of severance.

It is, of course, true that "if [a] federal statute is not subject to a narrowing construction and is impermissibly overbroad, . . . only the unconstitutional portion is to be invalidated." *New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S.Ct. 3348, 3361 n. 24, 73 L.Ed.2d 1113 (1982); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487 (1984) (plurality opinion). However, it is settled that the duty to sever does not empower courts to "introduce words of limitation in order to uphold the valid applications" of a challenged statute. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 44.16, at 529 (4th ed. 1986) (citing cases). "[T]he general federal rule is that courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991); *see generally id.* at 1124-25 (canvassing relevant caselaw of the Supreme Court).

Though severability may be achieved "by striking out or disregarding words that are in the [challenged] section," it may *not* be achieved "by inserting [words] that are not now there." *United States v. Reese*, 92 U.S. (2 Otto) 214, 221, 23 L.Ed. 563 (1875). Inserting into a statute words that Congress did not enact "would be to make a new law, not to enforce an old one," which "is no part of our [judicial] duty." *Id.*; *see also Trade-Mark Cases*, 100 U.S. (10 Otto) 82, 98, 25 L.Ed. 550 (1879) (holding that "it is not within the judicial province to give the words used by Congress a narrower meaning than they were manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body"). Although the Supreme Court cases discussed above involved penal Acts of Congress, their mandate, which is of continuing vitality, "has not been limited to penal statutes." *Eubanks*, 937 F.2d at 1125. Thus, for example, the Supreme Court, in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75, 102 S.Ct. 1534, 1540, 71 L.Ed.2d 748 (1982), noted that its decisions have "refused to narrow § 703(h)[, 42 U.S.C. § 2000e-2(h) (1988)] by reading into it limitations not contained in the statutory language."

As one state court summarized the Supreme Court's severance precedents:

> [W]henever a court, in order to uphold the provisions of a statute as constitutional, has to *interpolate* in such statute provisions not put there by the Legislature, in order, by *such* interpolation, to make the provision which the Legislature did put their constitutional, *this* is no case of severance, in any proper legal sense; nor is it in any *legal* or *logical* sense, a proper *limitation* of the provisions which are in a statute by judicial construction. *Such an action by a court is nothing less than judicial legislation pure and simple.*

Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 574, 34 So. 533, 554 (1902) (citing United States Supreme Court cases). In the Supreme Court's words, "it is for Congress, not this Court, to rewrite . . . [federal] statute[s]." *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971).

Viewed in light of these principles, the majority's severance in this case is "nothing less than judicial legislation." *Ballard*, 81 Miss. at 574, 34 So. at 554. Expressly disclaiming any intent to strike "officer or employee" from the honorarium ban because "that would invalidate the ban beyond the executive branch," the majority writes into the statutory definition of that phrase a limitation to "[M]embers of Congress, officers and employees of Congress, judicial officers and judicial employees." Maj. Op. at 1279. This is precisely what the Supreme Court has said federal courts may not do. *See generally Eubanks v. Wilkinson*, 937 F.2d 1118, 1124-25 (6th Cir. 1991) (discussing Supreme Court cases holding that federal courts may not rewrite federal statutes, under the guise of severance or otherwise).

The majority reads *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), as support for the proposition that federal courts may, under the rubric of "severance," insert words of limitation into a statute. *Brockett*, the majority explains, " 'pretermit[ed]' the issue of whether [the statutory term] 'lust' might be *construed* as referring only to morbid and shameful interests . . . and instead *severed* from the statute any meaning of lust other than shameful and morbid interests." Maj. Op. at 1279 (quoting *Brockett*, 472 U.S. at 500, 105 S.Ct. at 2800). Actually, the issue the Court pretermitted was whether or not it was required to defer to the lower court's conclusion that a saving construction of the term "lust" was impossible. 472 U.S. at 500, 105 S.Ct. at 2800. In any event, *Brockett*, properly understood, has no application here on the issue of severance (it is nonetheless instructive

insofar as it declined to invalidate facially a statute held to be not narrowly tailored, on the ground the statute nonetheless had an easily identifiable core of constitutionally permissible application). *See supra* p. 1284 n. 6.

First, in *Brockett* it was far from clear that the legislature intended for "lust," the challenged statutory term, to have the reach the plaintiffs ascribed to it. *See* 472 U.S. at 500 n. 10, 105 S.Ct. at 2800 n. 10 (stating that "[a]ppellants make a strong argument that the Court of Appeals erred in construing the Washington statute"). Here, of course, the contrary is true—Congress unmistakably intended to prohibit appellees, and their counterparts in the other branches of the federal government, from accepting honoraria. *See* 5 U.S.C. app. § 505(2) (applying the honorarium ban to "any officer or employee of the Government" except as exempted by statute). Even appellees concede that point. *See* Appellees' Br. at 34 (disclaiming any suggestion that "[Executive Branch employees'] coverage was 'inadvertent' ").

Second, *Brockett*'s holding was the product of the unusual and unique circumstances therein presented. Prevented from imposing a saving construction by the difficult issue of whether it was required to defer to the lower court's interpretation of the statute, the Court accomplished the same result via severance. Outside the unique circumstances of *Brockett*, no Supreme Court decision has employed the type of "severance" the majority employs here. Indeed, the Court on several occasions since *Brockett* has expressly refused to introduce words of limitation into statutes under the guise of "severance." *See, e.g., Wyoming v. Oklahoma*, ___ U.S. ___, ___, 112 S.Ct. 789, 803, 117 LEd.2d 1 (1992) (refusing to perform "severance," excluding the unconstitutional applications from Oklahoma statute requiring all utilities seeking to provide electricity in Oklahoma to purchase at least 10% of its coal from Oklahoma sources, because "it is clearly not this Court's

province to rewrite a state statute"), *cf. Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764-65, 106 S.Ct. 2169, 2180-81, 90 L.Ed.2d 779 (1986) (refusing to sever from a statute restricting abortion a requirement that women seeking abortions be informed of the medical and psychological risks associated with abortion because "[t]he radical dissection necessary for [severance] would leave [the statute] with little resemblance to that intended by the Pennsylvania Legislature"), *overruled in part on other grounds, Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

The majority's "severance" appears to me inconsistent with these post-*Brockett* cases. Even though the statute construed in *Wyoming*, as in *Brockett*, unlike the honorarium ban, contained a severability clause, the Court refused to introduce words of limitation in the statute to save its constitutionality, explaining:

> [The statute] applies to "[a]ll entities providing electric power for sale to the consumer in Oklahoma" and commands them to purchase 10% Oklahoma-mined coal. Nothing remains to be saved once that provision is stricken. Accordingly, the Act must stand or fall on its own. *We decline Oklahoma's suggestion that the term "all entities" be read to uphold the Act only as to the [Grand River Dam Authority, an agency of the state of Oklahoma], for it is clearly not this Court's province to rewrite a state statute.* If "all entities" is to mean "the GRDA" or "state-owned utilities," the Oklahoma Legislature must be the one to decide.

___ U.S. at ___, 112 S.Ct. at 803-04 (emphasis added) (quoting Oklahoma statute). Although *Wyoming* dealt with a state statute, it cannot seriously be doubted that federal courts do not have license to rewrite federal statutes. *See Blount v. Rizzi*,

400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991).

As applied to this case, *Wyoming* teaches that a *Brockett*-type "severance" is entirely inappropriate. Like the protectionist statute invalidated in *Wyoming*, the honorarium ban is sweeping in its application, reaching "any officer or employee of the Government" (with a narrow statutory exception). 5 U.S.C. app. § 505(2). Also, here, as in *Wyoming*, the legislature unmistakably intended the breadth of their respective statutes; in this respect, each case differs from *Brockett*.

Finally, in this case, no less than in *Wyoming*, severance would leave in place "a fundamentally different piece of legislation" than originally enacted, *Wyoming*, ___ U.S. at ___, 112 S.Ct. at 804, for Congress enacted a uniform, government-wide ban on honoraria. *See Wilkey Commission Report*, at 35-37 (referring, *e.g.*, to "the extreme lack of uniformity across the three branches of government in the rules governing honoraria" and a need for "applying equitable limitations [on honoraria] across the government"). Leaving the ban operative as to officers or employees in the legislative and judicial branches, but not the Executive Branch, contravenes that congressional intent, and it is the intent of Congress that is controlling on the issue of severability. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85, 107 S.Ct. 1476, 1479-80, 94 L.Ed.2d 661 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984) (plurality opinion).

In short, since the majority has facially invalidated the honorarium ban, it should strike "officer or employee" in its entirety from the statute, leaving the honorarium ban in place only as to Members of Congress. Its failure to do so may reflect a reluctance to facially invalidate the honorarium ban. That reluctance, however, would be better served by striking the statute down as applied to appellees or, better yet, upholding the constitutionality of the statute.

IV.

In conclusion, the Supreme Court's jurisprudence regarding facial challenges forecloses us from striking down the honorarium ban on its face. Under controlling caselaw, appellees should be required to demonstrate that applying the ban to them would violate the First Amendment. They have failed to make that showing, as the admittedly prophylactic ban is narrowly tailored to serve the government's compelling interest in avoiding the appearance of corruption or impropriety in its workforce. Moreover, because the honorarium ban imposes only a moderate burden on employees' First Amendment rights, the *Pickering* balance favors appellants in this case. I would therefore reverse the judgment below. Because the majority has chosen to take a different course, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 90-2922 (TPJ), 90-3027 (TPJ) and 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

PETER G. CRANE, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Mar. 19, 1992]

MEMORANDUM AND ORDER

JACKSON, District Judge.

In November, 1989, Congress enacted comprehensive multititle legislation known as the Ethics Reform Act of 1989 (the "Act"), 5 U.S.C. app. §§ 501 *et seq.*, Pub.L. No. 101-

194, 103 Stat. 1760, intended to reinforce standards of integrity within the federal government, both in fact and in the public's perception. Among its manifold provisions the Act undertook to expand the existing restrictions upon off-the-payroll money-making activities of current federal officeholders in all three branches of the U.S. government. One of the activities Congress found suspect, as tending to corrupt (or appearing so), was the venerable practice of some government officeholders—most conspicuously, Members of Congress themselves—of accepting "honoraria," i.e., generally a payment of more than token value, from private sources having more than a selfless interest in how the government governs, in return for some ostensibly unrelated and otherwise appropriate act or service, such as a speech to a business convention or an article for a trade journal. Title VI of the Act, imposing limitations on outside earned income, included a provision purporting to prohibit the receipt of honoraria by virtually anyone in federal service.

In these consolidated cases for declaratory and injunctive relief, two national unions (and one local union chapter) of federal employees, and numerous Executive Branch career civil servants individually, contend that Title VI of the Ethics Reform Act of 1989, to the extent it prohibits their acceptance of payments for their own lawful outside activities, imposes unconstitutional inhibitions on fundamental rights vouchsafed to them by the U.S. Constitution. They ask that the Court so adjudge and declare, and that the United States, and its several officials charged with enforcement of the Act, be enjoined from doing so as to them.

The individual plaintiffs are currently employed full-time by various Executive Branch departments and agencies of the U.S. government. None of the plaintiffs hold political appointments, elective office, or positions in the Legislative Branch. Each, using his or her own time and personal resources, and in

all respects in accordance with the regulations of their respective departments and agencies antedating the effective date of the Act, has written or spoken for valuable consideration on a variety of subjects.[1] The Act will prohibit their doing so in the future. They may continue to write or speak if they wish, but not for pay as they have done in the past.

The case is presently before the Court on cross-motions for summary judgment. No material issues of fact stand as an impediment.

Plaintiffs contend that the offending provision of Title VI, 5 U.S.C. app. § 501(b) (hereinafter "Section 501(b)"), violates their rights under the First and Fifth Amendments to the Constitution, and that the implementing regulations, issued by the Office of Government Ethics ("OGE"), 56 Fed.Reg. 1721 (1991) (to be codified 5 C.F.R. § 2636), are "arbitrary and capricious" in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA").[2]

Section 501(b) states in pertinent part:

> [a]n individual may not receive any honorarium while that individual is a Member [of Congress], officer or employee [of any of the three branches of the federal government].

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[1] Plaintiffs include, for example, a Nuclear Regulatory Commission lawyer who writes on Russian history (Crame); a Voice of America editor whose many published articles are generally on matters of international economics (Deutsch); a microbiologist at the Food and Drug Administration who reviews dance performances for print and broadcast media (Jackson); a tax examiner for the Internal Revenue Service whose avocational writing is on outdoor and environmental subjects (Grant); and a civilian electronics technician for the U.S. Navy and a spare-time scholar/author on ironclad vessel technology of Civil War vintage (Putnam).

[2] The regulations promulgated by the OGE apply only to employees of the Executive Branch. 5 U.S.C. app. § 503.

"Honorarium" is defined in Section 505(3) as:

> a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.[3]

The statute thus prohibits employees from receiving compensation for such private activities as writing non-fiction articles, presenting papers at conferences or meetings, serving as expert witnesses, and giving lectures or conducting seminars in their fields of interest. Plaintiffs, federal employees who do some or all of the above as a second profession or avocation,[4] face civil penalties and possible disciplinary action if they continue to receiving compensation for their expressive activities while the statute remains in effect.

No one or more of the relevant Supreme Court cases in the constitutional firmament so far cited by the parties afford a firm fix on the analysis appropriate to a decision in this case. The cases, however, establish what may be considered lines of position, and from the various points at which those lines of position intersect it is possible to dead-reckon to a result.

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[3] "Appearance" excludes "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 56 Fed.Reg. 1725 (1991). "Speech" does not include "recitation of scripted material, as for a live or theatrical production," or the "conduct of worship services or religious ceremonies." 56 Fed.Reg. 1725 (1991). "Article" does not include "works of fiction, poetry, lyrics, or script." 56 Fed.Reg. 1726 (1991).

[4] Also named as a plaintiff is National Treasury Employees Union ("NTEU") Chapter 143. NTEU brought suit on behalf of its members, and Chapter 143 is a named plaintiff because the statute has, it alleges, interfered with its ability to publish its newsletter.

I.

Plaintiffs assert for a start that Section 501(b) "directly and substantially" burdens their First Amendment rights of free speech by depriving them of any financial incentive to speak or write; in fact, in many cases it operates as a disincentive, in that they are unable even to recoup necessary out-of-pocket expenditures connected with their non-governmental writing or speaking activities. Defendants respond that the plaintiffs remain in all respects able to speak or write as they have in the past. They are simply no longer entitled to be paid for it. Thus, they say, Section 501(b) should be regarded as merely an "incidental and indirect" burden on plaintiffs' First Amendment rights.

Any lingering uncertainty as to whether a law operating as a financial disincentive to constitutionally protected expressive activity represents a "direct," as distinguished from an "incidental," burden, however, was dispelled by the Supreme Court's recent decision in *Simon & Schuster, Inc. v. New York State Crime Victims' Board*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) holding that a state statute expropriating, for the victims' benefit, monies paid to an accused or convicted criminal for his or her first-person account of the crime violated the First Amendment. Acknowledging that the state's legislative purpose was to compensate for harm done, not to suppress the thought expressed, the Supreme Court nevertheless found the financial burden along a sufficient inhibition of protected speech to offend the Constitution although the speaker remained at liberty to speak for free.[5]

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[5] Financial or economic penalties of one sort or another imposed upon constitutionally protected conduct have consistently been held by the Supreme Court to represent a direct burden. *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S.Ct. 2667,

The law at issue in *Simon & Schuster* was, however, a "content-based" statute in the opinion of the Supreme Court. Only income derived from expressions of the criminal's "thoughts, feelings, opinions or emotions" regarding his crime was subject to confiscation. *Id.* 112 S.Ct. at 505. The state had "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income," the Supreme Court said. Thus even an avowedly "compelling" state interest in "compensating victims from the fruits of crime" was insufficient to save such a law not "narrowly tailored" to that otherwise commendable end. *Id.* at 512.

Section 501(b) of the Act, on the other hand, is arguably "content-neutral." Any "speech" or "article" on any subject, or an "appearance" anywhere, by federal employees (excluding those purportedly excepted by the OGE regulations) is proscribed if done for pay. Thus *Simon & Schuster* is distinguishable, and is apposite to this case principally only insofar as it reinforces the conclusion as to the "direct" nature of the burden imposed by financial penalty laws on protected speech. The Supreme Court expressly declined in *Simon & Schuster* to address the distinctions, and formulate a rule for a content-neutral statute of similar import. *Id.*, fn. *, at 511.

II.

Content-neutral regulatory legislation that also operates nevertheless to inhibit constitutionally protected expressive activity has most recently been addressed bythe Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), upholding a municipal

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101 L.Ed.2d 669 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). *See also Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991).

regulation governing sound-amplification technology to be used for musical events in a city park.[6] Observing that music no less than speech is protected by the First Amendment, but that abatement of excessive noise is of legitimate civic concern, the Supreme Court stated:

> Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information,' (quoting *Clark v. CCNV*, 468 U.S. 288, 293 [104 S.Ct. 3065, 3069, 82 L.Ed.2d 221] (1984)).

Id. 491 U.S. at 791, 109 S.Ct. at 2753.

There was, of course, a "governmental interest" at least as significant as noise abatement in universal contemplation when Section 501(b) of the Ethics Reform Act of 1989 was under consideration by Congress. Abuses of the "honoraria" custom and practice were well-documented, as was the consequent erosion of public confidence in the integrity of the government, and had been common public knowledge for many years.[7] And Section 501(b) certainly obstructs no "channel" of communication. So long as federal employees receive no profit for their expressive labors, the world is their stage.

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[6] *See also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

[7] *See, generally*, Memorandum of Points and Authorities of *Amicus Curiae* Common Cause in Support of Defendants, May 20, 1991, pp. 6-12. *See also Buckley v. Valeo*, 424 U.S. 1, 26-27, 96 S.Ct. 612, 638-39, 46 L.Ed.2d 659 (1976).

But Section 501(b) does not purport to be a "time, place and manner" regulation such as that at issue in *Ward*. It prohibits all speech-for-profit by federal employees, no matter when or where, or the medium employed. It thus "discriminate[s] among speakers" (i.e., among federal office-holders and everyone else), and "impose[s] direct quantity restrictions" (i.e., a total ban), on compensated excessive activities of the former, albeit in a worthy cause. *Buckley v. Valeo*, 424 U.S. 1, 18, 96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976).

Section 501(b)'s defenders observe, however, that governmental employees have always (at least in recent times) been *sui generis* insofar as they may avail themselves of constitutional rights that private individuals enjoy without limitation. For nearly a half century the Supreme Court has recognized that certain liberties of the most fundamental sort for private citizens of a representative democracy may, consistently with the Constitution, be denied to the same citizens when they enter upon government employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (upholding provisions of Hatch Act, § 9(a), prohibiting partisan political activity by federal employees, against challenges under First, Fifth, Ninth, and Tenth Amendments); *see also U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

III.

In the seminal modern case directly addressing the freedom of speech of civil servants in particular, as distinguished from their political activity, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court reversed a state court decision sustaining the dismissal of a public school teacher for publishing a letter critical of the board of education for whom he worked. The issue on which

the outspoken teacher had expressed himself being one of some public importance, the Supreme Court held, in the absence of proof that the teacher's own performance of duty had suffered, or that he had thereby interfered with the regulation operation of the schools generally, the school board's governmental interest in inhibiting his utterances was "not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573, 88 S.Ct. at 1737.

In so holding, however, the *Pickering* court observed that a government "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The constitutional validity of any such regulation depends upon the balance between the governmental interests "in promoting the efficiency of the public services it performs through its employees," and the interests of the employees, as citizens, "in commenting upon matters of public concern." *Id.* at 568, 88 S.Ct. at 1734.[8]

The defenders of Section 501(b) point to that *dictum* from *Pickering* as evincing a recognition by the Supreme Court that a sufficiently significant relationship between potentially disruptive "speech" by governmental employees and the efficiency of the civil service will legitimate an otherwise constitutionally dubious proscription. Section 501(b) is not, how-

[8] What may be a "matter of public concern" may depend upon the eye of the beholder. *Compare Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (county employee's statement of approval of Presidential assassination constitutionally protected) with *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (assistant prosecutor's intra-office circulation of questionnaire critical of district attorney following her notice of unwanted transfer constitutionally unprotected as being a matter of "personal interest").

Plaintiffs here do not rely upon any presumed importance of their activities to the public weal to justify their right to pursue them for profit.

ever, addressed to the *speech* of public servants as such, whatever its subject matter, or even to expressive activity of any sort entitled to constitutional protection. It prohibits *conduct*, specifically, the receipt of money, and it is expressly intended to suppress an idea, or more precisely, a perception, accurate or not, which is altogether unworthy of any protection whatsoever, namely, that government favor may be bought, with payment to be made in the guise of an honorarium.

IV.

Turning to the seminal modern case addressing conduct-as-speech, or "symbolic speech," i.e., the expression of an idea by deed rather than word, *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), holds that Congress may constitutionally prohibit the intentional mutilation of draft cards notwithstanding it is done in protest of an unpopular governmental policy. The Supreme Court said that

> [w]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-77, 88 S.Ct. at 1678-79.[9]

[9] Subsequent cases involving the constitutionality of the impact of regulatory legislation upon communication-by-conduct have concentrated primarily upon the extent to which the purpose of the legislation has been to suppress expression rather than to accomplish a legitimate noncensorial objective. *See, e.g., Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (statute prohibiting offensive displays in vicinity of foreign embassy unconstitutional); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (statute prohibiting flag-burning as "desecration of venerated object" unconstitutional).

V.

Applying the teaching of the foregoing cases to Section 501(b) of the Ethics Reform Act of 1989, certain principles are easily discerned.

First, it is abundantly clear, and by none disputed, that Congress has not only the constitutional power but the duty as well to promote the integrity of, and popular confidence in and respect for, the federal government. Indeed, it would be difficult to conceive of a governmental interest more vital to the survival of a democratic form of government.

Second, Section 501(b) is content-neutral to the extent it inhibits expressive activity by rendering it unremunerative. A federal employee is no less dissuaded by it from making public exhortations to civic virtue than from calls to arms in revolt.

Third, no issue is taken with the proposition that Section 501(b) is conduct- rather than expression-oriented. Corruption, not criticism, is its central target.

Fourth, plaintiffs here are all government employees who, as a condition of their employment, have relinquished certain First Amendment prerogatives that their fellow citizens in private life retain unfettered. One such prerogative is the right to speak freely, certainly on matters of purely personal interest, without concern for the possible harm it may do to the legitimate interests of their employer or the employer's anticipated displeasure.

Nevertheless, in each of the foregoing classes of cases the Supreme Court has found, as a *sine qua non* of constitutional legitimacy for regulatory legislation having the effect of sup-

pressing freedom of expression to the slightest degree, that the law in question go no farther than necessary to accomplish its objective in vindicating even the most significant of governmental interests. Such a law must, as the Supreme Court has said time and again, be "narrowly drawn" or "finely tailored" to that end, and it must not discriminate between speakers or speech indistinguishable from one another insofar as its regulatory objective is concerned. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983); *Carey v. Brown*, 447 U.S. 445, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). In neither respect, it seems, will Section 501(b) thus survive scrutiny.

The phenomenon of the sinister "honorarium" that Section 501(b) was expressly written to exterminate presupposed the conflux of private money and governmental power in a context in which the latter might be bent to the service of the former. It presumed some relationship between the federal officeholder/speaker and his audience giving rise to an apprehension (with or without justification) that payment for the speech was in reality payment for some occult benevolence the speaker was in a position to bestow.

Yet Section 501(b) is not so limited. No official nexus or relationship between the officeholder and those for whom he would speak or write is contemplated by the statute. Payments for a "speech" or an "article" are proscribed to federal employees even when there is neither the possibility nor a perception that the office and the payment are interdependent.

Moreover, Section 501(b) prohibits only speeches, articles, or appearances for profit by federal employees. It makes no mention of the myriad other forms of expression for which payments could lawfully be made to and received by the same employee on the same subject from the same supplicant in quest of the same governmental favor—a work of fiction such

as a novel, for example, or a musical score; a painting; an object of handicraft; a lesson in some art or skill; a film or videotape; even a congratulatory letter or telegram—as OGE's implementing regulations clearly reflect (without, it should be noted, any legislative warrant).

In the case of *Carey v. Brown*, 447 U.S. 445, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), the Supreme Court struck down a state residential-neighborhood anti-picketing statute, on Equal Protection as much as First Amendment grounds, because it contained an exception for picketing in connection with a labor dispute. Acknowledging that the purpose of the statute was to ensure the privacy in his home of the object of the picketing, the Supreme Court observed that the labor picketing it continued to allow was "equally likely to intrude on the tranquility of the home." *Id.* at 462, 100 S.Ct. at 2291.

> First, the generalized classification which the statute draws suggests that [the state] itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all non-labor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.
>
> More fundamentally, the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make

it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute.

The second important objective advanced by appellant in support of the statute is the State's interest in providing special protection for labor protests.

* * * * *

The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues. . . .

* * * * *

Appellant's final contention is that the statute can be justified by some combination of the preceding objectives. This argument is fashioned on two different levels. In its elemental formulation, it posits simply that a distinction between labor and nonlabor picketing is uniquely suited to furthering the legislative judgment that residential privacy should be preserved to the greatest extent possible without also compromising the special protection owing to labor picketing. In short, the statute is viewed as a reasonable attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes. But this attempt to justify the statute hinges on the validity of both of these goals, and we have already concluded that the latter—the desire to favor one form of speech over all others—is illegitimate.

Id. at 465-68, 100 S.Ct. at 2292-94 (footnotes omitted).[10]

[10] In a different but related context the U.S. Court of appeals for the District of Columbia Circuit has said, in invalidating a legislative provi-

Section 501(b) falls victim upon dissection to a similar appraisal. To the extent that it prohibits federal employees' acceptance of payments for all scholarly labors in speech or article form, no matter the absence of a relationship between the subject matter of their expressive works, their government jobs or their audience, or the identity and the motives of the persons who are paying for their efforts, it is over-inclusive. That it permits poets and musicians, or artisans and artists, to receive such payments while speechmakers and non-fiction writers cannot, despite the presence of a relationship giving rise to the suspicions that Section 501(b) sought to allay, the statute belies the notion that the governmental interest in suppressing questionable payments is paramount to all others, and renders it simultaneously under-inclusive.

VI.

It remains to be considered whether Section 501(b), or, more precisely, whether the section as applied to the Executive Branch federal employee/plaintiffs here, is severable from the remainder of the Act. It is axiomatic that severability

sion deemed by the Federal Communications Commission to give it regulatory authority to treat similarly situated broadcast licensees differently, that such "claims lie at the intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons." *News America Publishing, Inc. v. Federal Communications Commission*, 844 F.2d 800, 804 (D.C.Cir. 1988). "Where legislation affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's true target is the message. Accepting that intuition without making an actual determination of the legislators' motives, the Supreme Court has for the regulation of speech insisted on a closer fit between a law and its apparent purpose than for other legislation." *Id.* at 804-05.

questions are answered by reference to legislative intent. *See Sutherland Stat. Const.*, § 44.03 (4th Ed. 1986).

This legislation is notable for the absence of a paper trail left in the wake of its passage through Congress.[11] This would be curious for an Act of this magnitude, were it not for the tact that the legislation was partly the product of a Bipartisan Task Force of the House of Representatives, possibly sensitive to the prospect of unwelcome publicity for another of the provisions of the Act raising Congressional salaries. Although the legislative history yields no direct evidence of Congress' intention regarding severability, it is helpful in supplying information necessary for the Supreme Court's mandated analysis of how to proceed in the absence of direct evidence.

A succession of Supreme Court cases has held that, in the absence of a severability clause, or direct evidence of legislative intent, a statutory provision is presumed severable if what remains after severance "is fully operative as law." *I.N.S. v. Chadha*, 462 U.S. 919, 934, 103 S.Ct. 2674, 2665, 77 L.Ed.2d 317 (1983), citing *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 512 S.Ct. 559, 564, 76 L.Ed. 1062 (1932); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652-53, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984). The severability inquiry evaluates "whether the statute will func-

[11] Such legislative history as exists can be found at: 135 Cong.Rec. H8747 (Nov. 16, 1989) (passed the House); 135 Cong.Rec. S15972 (Nov. 17, 1989) (passed the Senate); 135 Cong. H9253 (Nov. 21, 1989) (Report of the Bipartisan Task Force); 135 Cong.Rec. H9717 (Dec. 11, 1989) (a summary of th eAct, as well as its full text); and 136 Cong.Rec. H1645 (April 24, 1990) (technical amendments, not relevant to the Provision at issue here).

Although the bill, as H.R. 3660, was referred jointly to the Committees on Rules, House Administration, the Judiciary, Standards of Official Conduct, Ways and Means, and Government Operations, only the Rules Committee issued a report.

tion in a *manner* consistent with the intent of Congress." *Alaska Airlines v. Brock*, 480 U.S. 678, 685, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987) (challenge to employee protection provision of Airline Deregulation Act) (emphasis in original).

> [T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

Id.[12] Indeed, the Supreme Court has proclaimed a generall bias toward preserving the vitality of as much of a Congressional enactment as possible in its familiary pronouncement that the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893 (1937); *see also, Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971).

There are several reasons that yield the conclusion that Section 501(b) is severable. First, the Report of the Bipartisan Task Force (issued *after* the Act had been passed (discloses that it was the honoraria-related activities of *Members of Congress* that gave greatest concern, indicating that the prohibition on the receipt of honoraria by other members of the government workforce was not of pivotal importance to pas-

[12] *See also Brockett v. Spokane Arcades*, 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985) (holding that a moral nuisance statute with an overbroad definition of "prurient" should not have been struck down in its entirety, since the statute without the offending provision retained its effectiveness as regulation of obscenity). The Court cited its own language from 1881, that "the same statute may be in part constitutional and in part unconstitutional, and [ ] if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Allen v. Louisiana*, 103 U.S. 80, 83-84, 26 L.Ed. 318 (1881).

sage of the Act. Witness, for example, the Task Force's description of the purpose of the honoraria limitations predating passage of the Act:

> The current limitations are outside earned income and honoraria were prompted by three major considerations: First, substantial payments to a *Member of Congress* for rendering personal services to outside organizations presents a significantt and avoidable potential for conflict of interest; second, substantial earnings from other employment is inconsistent with the concept that being a *Member of Congress* is a fulltime job; and third, substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of public officials.

135 Cong.Rec. H9256 (Nov. 21, 1989) (emphasis added). The Task Force Report, even though ultimately recommending a ban on *all* honoraria for *all* femployees, follows the foregoing passage with numberous paragraphs suggesting that only the honoraria received by *Members of Congress* was at issue. The entire discussion relates to the growth in numbers and amount of honoraria accepted by Members; tax shelters set up by Members; the increasing evidence of an intent to purchase the vote of Members on the part of those offering honoraria, and so forth. Nothing is said to suggest that the extension *vel non* of Section 501(b) to all federal employees was a "dealbreaker" provision, and the bill was ultimately passed with provisions that treated even honoraria for Representatives and Senators separately and differently.

Second, there is little in the floor debates to suggest that Section 501(b) was of such paramount importance and that the Act would not have survived without it. Although there is some language that suggests that an "honoraria ban" generally was the "heart" of the ethics reform effort,[13] the referencres to it on the floor of Congress, as in all other places, appear in context implicitly to address the restrictions on the receipt of honoraria by Representatives and Senators only. Much of siuch language as pertains to honoraria at all is purely rhetorical and hyperbolic, and it is obvious from the many pages of debate on matters other than the hooraria issue that Congress was *not* particularly preoccupied with Executive Branch civil servants covertly manipulating their functions to the advantage of private interests by taking payment for articles and speeches.

It is abundantly clear, however, from the entire history of the Act, that what Congress was principally concerned about was a Member of Congress receiving money from a constituent group in such a fashion that it created an appearance of impropriety and of undue influence.[14] In summary, there are a

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[13] During the course of the debate in the Senate on Nov. 17, 1989, Sen. Mitchell expressed the view that the honoraria ban is the "heart of the principal reform in ethics in this legislation." 135 Cong.Rec. S15972. Sen. Grassley, responding, disagreed that this was so. 135 Cong.Rec. S15973-74.

[14] In the House, on November 16, 1989, for example, Rep. Martin introduced the bill stating:

> [The bill] reforms the ethics processes *of the House*, removes the *stigma that this House* . . . can be used or misused by outside interests, and I hope will begin to restore a measure of faith that must be had between those who govern and those who are the governed. . . . It was a genuine concern for the *future of this House and our own reputations* as Members that drove the ethics reform process.

Comments of Rep. Martin, 135 Cong.Rec. H8747-48 (1989) (emphasis added). Similarly, Rep. Weiss stated that, "Perhaps the single most important part of this package is the ban on honoraria for *Members of the House*." Comments of Rep. Weiss, 135 Cong.Rec. H8767 (Nov. 16, 1989) (emphasis added).

wide variety of reasons to conclude that Congress would have enacted the Ethics Reform Act of 1989 even without the extension of Section 501(b) to all federal employees, whether or not it would have done so had the House of Representatives escaped its clutches.

For the foregoing reasons, therefore, it is, this 19th day of March, 1992,

ORDERED, ADJUDGED, and DECLARED, that Section 501(b) of the Ethics Reform Act of 1989, 5 U.S.C. app. §§ 501 *et seq.*, Pub.L. No. 101-194, 103 Stat. 1760 (1989) is unconstitutional insofar as it applies to Executive Branch employees of the United States government; and it is

FURTHER ORDERED, that defendants United States of America, William P. Barr, and Stephen D. Potts, in their official capacities, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, are hereby permanently enjoined from enforcement of Section 501(b) against any Executive Branch employee of the United States government alleged or believed to be in violation thereof, and it is

FURTHER ORDERED, that this judgement, and the permanent injunction entered hereby, are stayed pending completion of proceedings on any timely appeal taken herefrom.[15]

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[15] The Court was informed by the parties on December 4, 1991, that legislation was introduced in the House of Representatives as H.R. 3341, and passed by that chamber on November 25, 1991, purporting to amend Section 501(b) to eliminate the honoraria ban for federal employees if the speech, arrticle or appearance for which they are paid, and the payment itself, are unrelated to the employees' official duties or status.

The Court was also informed that H.R. 3341 was prevented of consideration by the Senate by the objection of a single U.S. Senator, as the Senatte rules permit him to do. Consequently, the first session of the 102d Congress adjourned November 27, 1991, without enacting legislation correcting the constitutional infirmities of Section 591(b)

APPENDIX C

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

No. 92-5085

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

[Filed Sept. 21, 1993]

Before: WILLIAMS, SENTELLE and RANDOLPH, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing of the United States and of the response thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
For the Court:
Ron Garvin, clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

No. 92-5085

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

AND CONSOLIDATED CASES

[Filed Sept. 21, 1993]

Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

The Suggestion For Hearing *En Banc* of the United States and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
For the Court:
Ron Garvin, clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Sentelle would grant the suggestion.

A statement of Circuit Judge Williams concurring in the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Silberman dissenting from the denial of rehearing *en banc* is also attached.

NTEU v. USA, No. 92-5085

WILLIAMS, *Circuit Judge*, concurring in denial of rehearing and rehearing en banc: Judge Silberman raises the tempting proposition, ignored by the parties to this litigation, that by moving the closing end of a parenthesis in the definition of "honorarium" we might transform the statute into one of virtually undoubted constitutionality. I believe the panel correctly resisted this temptation.

As enacted, the amended definition of honorarium reads as follows:

> The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual . . . .

5 U.S.C. App. 7 § 505(3).

Under Judge Silberman's microsurgery, the end of the parenthesis is moved up, so that the definition—and thus the ban—applies *only* to appearances, speeches and articles related to the employee's duties or for which the payment relates to his or her status with the government. Thus:

> The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles) if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual . . . .

Before addressing the substance of this revision, we should consider its syntax, which bears no resemblance to English. The prepositional phrase "by a Member, officer or employee" appears superficially to be a part of the subject-or-status limitation; once the reader recognizes that it is not, he must set off on a wholly unguided search for the terms the phrase really modifies ("an appearance, speech or article").[1]

Judge Silberman's justification for his adjustment rests on some legislative history and on the view that the statute is illogical as written. The legislative history—like so much legislative history—is highly ambiguous and the statute as written is by no means so irrational as to warrant our rewriting it.

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[1] The draftsmen could have attained the aim inferred by Judge Silberman with no such confusion. For example:

> The term "honorarium" means a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government, except that the term excludes any actual and necessary travel expenses incurred by such individual. . . .

The only directly relevant item of legislative history is the following observation of the conference committee:

> Subsection (b) amends the definition of 'honorarium' to include payment for a 'series of appearances, speeches or articles,' if the subject matter is related to the individual's duties or payment is made because of the individual's status with the Government, rather than only payment for a single event.

H.R. Conf. Rep. No. 176, 102d Cong., 1st Sess. 12 (1991); see also Silberman, J., *infra* at [5] (emphasizing the word "include").

The committee's observation is quite consistent with the wording used by Congress in the statute. As enacted, the amended statutory definition *does* "include" a series of appearances, speeches or articles when the conditions specified in the parenthesis, and in the committee report, are present. The legislative history provides no license to start shuffling parentheses around.

The same is true if we focus on the way in which the 1991 amendment *changed* the pre-existing law. The unamended law obviously encompassed receipt of payment for a series of speeches. Before the amendment it would have been an odd defense, and surely a losing one, for an employee to say, "Not guilty—I took payment for *three* speeches, not one." As the implementing regulations promulgated by the Office of Government Ethics ("OGE") confirm, people understood the unamended statute to treat a series exactly like a single event. "An economist employed by the Department of the Treasury," went one of the OGE's examples, "has entered into an agreement with a speakers bureau to deliver ten afterdinner speeches to be arranged by the speakers bureau over a 6 month period. The employee may not receive the contract fee of $10,000." 56 Fed. Reg. 1721, 1725 (1991).[2]

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[2] To reflect the 1991 amendment, the OGE's Implementing regulations now specify that the ten speeches are unequivocally barred if they

Since the original act treated a series of speeches the same as a single speech, the only plausible reason for adding a reference to a series of speeches must have been to treat them differently.

Citing a Senate committee report saying that under the pre-amendment ban a federal employee "can teach a full semester course on a particular subject, but cannot be paid for a single lecture on the same subject", S. Rep. No. 29, 102d Cong., 1st Sess. 5 (1991), Judge Silberman argues that *Congress* did not think that the unamended statute covered payments for a series of events. See Silberman, J., *infra* at [12]. But the exception for teaching arose not from any distinction between a series and a single event but from the statute itself. The Ethics Reform Act of 1989 barred Members of Congress, officers of the federal government, and high-level federal employees other than career civil servants from receiving compensation for teaching *unless* they secured "the prior notification and approval" of the appropriate entity. Pub. L. No. 101-194, 103 Stat. 1761 (1989); see 5 U.S.C. App. 7 § 502(a)(5) (1992). The plain implication, as the commentary to regulations issued by the Judicial Conference of the United States explains, was that "the prohibition on receipt of honoraria does not foreclose teaching for compensation." 2 Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures* V-41 (1991). Thus, OGE's implementing regulations excluded from the honorarium ban "[c]ompensation for teaching a course involving

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are "unrelated." See 5 CFR § 2636.203(a) (Example 3). The OGE, unlike Judge Silberman, reads the amended statute to mean what it says; the OGE regulations stipulate that the honorarium ban does not cover "[p]ayment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government." 5 CFR § 2636.203(a) (13).

multiple presentations by the employee offered as part of the regularly established curriculum of an institution of higher education." See 56 Fed. Reg. 1725 (1991).

Moreover, the Senate committee was not concerned with some fantastic loophole for multiple speeches but with the ban's unduly harsh treatment of activities other than teaching. The committee's bill accordingly sought to introduce a broad subject-or-status limitation for "an appearance, a speech, or an article", language the committee used to cover both isolated events and elements of a series. See S. Rep. 102-29 at 17. *But Congress never enacted this broad limitation.* Instead, the 1991 amendment left in place the flat ban on honoraria for isolated events, while relaxing it for a series. In sum, Congress never supposed that the ban exempted multiple speeches (other than those encompassed in the special treatment of teaching), and the effort to impose a general subject-or-status limitation fizzled.

As to the sense of the amended statute: Congress may well have thought that the added effort required for a government official to make a series of speeches, etc. (not to mention the added effort of his listeners) provided an inherent limitation on this avenue of corruption, justifying a more relaxed approach. To be sure, this limitation is not perfect. It may take no more effort to write a series of three 10,000-word articles on a single subject than to write one 30,000-word article. What is more, as the illicit effect of the payment will turn in part on its relation to the worker's effort, payors could achieve their corrupt purposes simply by boosting the payment.

Still, there is another reason why Congress might have treated honoraria for isolated events or articles more strictly than honoraria for a series. If a Member of Congress or a government employee is making *repeated* paid appearances before a particular group, his connection to the group is likely to be more open and more visible to the public (or the public's

watchdogs) than if he had simply accepted a one-time payment for a single appearance. Congress might reasonably have concluded that corruption is less likely under such circumstances.

* * *

Judge Silberman goes on to support *en banc* treatment on the premise that we might wisely excise from circuit law the application of a "narrow tailoring" test to restrictions on the speech of government employees. See Silberman, J., *infra* at [15], citing *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983) (applying narrow tailoring test). Before the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), repudiated the idea that the "narrow tailoring" concept encompassed a "least restrictive means" test in cases not subject to strict scrutiny, *id.* at 796-802 & n.6, this proposal would have raised a most interesting issue. Post-*Ward*, however, it is apparent that "narrow tailoring" is itself a balancing test, under which courts inquire whether the disputed ban "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799; see also *Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992). Thus "narrow tailoring" seems to add little more than metaphor. See *id.*[3]

Judge Silberman apparently disagrees. Courts review restrictions on the speech of government employees, he observes, by balancing "the interests of the [employee], as a

[3] Judge Silberman's "understand[ing]" the panel opinion to invalidate an honorarium ban "so long as the court believes even one employee who should be permitted to speak for pay is not permitted [to do so]", see Silberman, J., at [19], is of course a *mis*understanding. Such a position would ignore the *Ward* Court's use of the word "substantially". The panel invalidated the ban only after finding that it "reach[ed] a lot of compensation that has no nexus to government work that could give rise to the slightest concern", slip op. at 11, and after reviewing the line-drawing concerns that might have justified the broader ban, *id.* at 11-14.

citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Silberman, J., *infra* at [13], quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Judge Silberman acknowledges that overbreadth can cause a restriction to fail this generalized balancing test, for "[w]hen the government burdens substantially more speech than 'required' by its asserted interest, then its asserted interest might not outweigh that greater burden." *Id.* at [15]. But he indicates that substantial overbreadth is not *always* fatal; as long as the legitimate interests served by restricting the speech of government employees outweigh the burdens caused by the restriction, the restriction passes constitutional muster even if the restriction's *scope* is substantially broader than the goal supports.

But if the burdens caused by a restriction on speech are substantially greater than is appropriate to achieve the government's legitimate end, taking all line-drawing problems into account and according the political branches' judgement due weight, it is hard to see what interest justifies the excess burdens. They appear wholly unsupported, for by hypothesis the government could amply achieve its purposes by enacting a narrower restriction. As a practical matter, then, the generalized *Pickering* balance and the "narrow tailoring" test seem unlikely to yield different results.

Assuming that a "narrow tailoring" test *does* add to what is implicit in the concept of balancing, moreover, the signs from the Supreme Court appear quite consistent with applying such a test to restrictions on the speech of government employees. In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld the Hatch Act only after considering whether certain provisions rendered it "fatally overbroad". *Id.* at 580. In *Pickering* the Court reserved judgment on "the extent to which teachers can be required by

narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public." 391 U.S. at 572 n.4 (emphasis added). And in *Brown v. Glines*, 444 U.S. 348 (1980), in upholding Air Force regulations that required members of the service to get the appropriate commander's approval before soliciting signatures for petitions on Air Force bases, the Court stated its grounds in terms that almost exactly pre-figured *Ward*'s formulation of "narrow tailoring", saying that "the Air Force regulations restrict speech no more than is reasonably necessary to protect the substantial governmental interest." *Id.* at 355.

In any event, the "narrow tailoring" test applies to government restrictions on speech on a government-owned "public forum", and I question whether the government's interest as *employer* is so distinct from its interest as *proprietor* as to justify applying a markedly different test (assuming that were to flow from Judge Silberman's proposal). At any rate, there seems no reason to rush into an *en banc* on questions that no party has raised.

NTEU v. USA, No. 92-5085

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc:* The panel opinion declared an act of Congress governing the acceptance of speaking fees (honorarium) on the part of officers and employees of all three branches of government unconstitutional on its face as it would apply to the entire executive branch—not the legislative or judicial branch. The intrinsic importance of such a decision is hardly to be questioned. But I think the case is particularly deserving of rehearing, because I doubt that it is necessary to decide the constitutional question. The district court's opinion, which the panel affirmed, paradoxically, declared unconstitutional the *unamended* version of a statute that had been amended before the court's decision (and the court considered outdated executive branch regulations implementing the statute). Although the panel noted the statute's amendment, it did not explicitly consider the amendment's significance and the possibilities it offers in avoiding the constitutional question. Even if it were necessary to decide the statute's constitutionality, I am inclined to think we should employ a quite different constitutional analysis and supply a different remedy. The panel, overlooking what seems to me to be the most obvious remedial order, one that would strike down only the arguably offensive part of the statute, instead unjustifiably views executive branch employees more favorably than congressional and judicial employees and inexplicably—presumably because inexplicable—struck down a portion of the statute which is unquestionably constitutional.

A.

Congress, in November, 1989, seeking to place new and more stringent restrictions on the receipt of "outside" income by governmental employees than previous laws and regulations had provided, enacted a series of amendments to the Ethics in Government Act of 1978. Although the debates surrounding the adoption of perhaps the most controversial aspect of this legislation—a flat ban on the receipt of "honoraria"—focused largely, if not exclusively, on the need for such a ban to halt the receipt of honoraria by *members of Congress*, the act as passed applied that unqualified ban to virtually all government employees. These amendments, collectively entitled "The Ethics Reform Act of 1989," ("Reform Act") Pub. L. No. 101-194, became effective on January 1, 1991, and the Office of Government Ethics promulgated implementing regulations on January 17. *See* 56 Fed. Reg. at 1721.

As originally enacted, and as currently written, the Reform Act provides: "An individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. App. 7 § 501(b). As originally enacted, but *not* as currently written, the act defined the term "honorarium" as "a payment of money or anything of value for an appearance, speech or article by a Member [of the House of Representatives], officer or employee, excluding any actual and necessary travel expenses. . . ." *See* Pub. L. No. 101-194, Title VI, § 601(a), 103 Stat. 1760 (1989). Thus, the original Reform Act created a flat ban on the receipt of honoraria by virtually all governmental employees, but did not apply that ban to senators.[1]

Within a very short time after the enactment of the Reform Act, a strong sentiment seems to have emerged in Congress that the flat ban applicable to all governmental employees was unwarranted (and, indeed, probably unintended). At the end of 1990—even before the effective date of the Reform Act—the Senate *unanimously* passed a bill that would have replaced the flat ban on the receipt of honoraria with a limited prohibition against the receipt of honoraria by government employees where the subject matter of the writings directly related to the employees' official duties or where the payment was related to the officers' status. *See* S. Rep. No. 29, 102d Cong., 1st Sess. 2 (1991). That bill drew no distinction between one-time speeches and a "series" of speeches. *Id.* at 2, 16-17. The House failed to act on the bill before it recessed, and it did not become law. *Id.* at 2.

On January 22, 1991, only days after Congress had reconvened, Senators Glenn and Roth again introduced a bill, S. 242, that "was the same in substance" as the bill introduced

[1] The Senate voted against a ban on honoraria, but, unlike the House, it did not accept the pay raise passed as part of the ethics package.

the previous year.[2] S. Rep. at 2. S. 242 had no fewer than 30 co-sponsors. *See id.* It was referred to the Committee on Governmental Affairs, which reported the bill favorably to the Senate without dissent. *See id.* at 2-3. In fact, there is no indication that any senator ever doubted the desirability of amending the Ethics Reform Act so as to modify the flat ban on the receipt of honoraria by governmental employees. As the Senate Committee noted, "Congressional debate concerning the honoraria [when the original act was passed] focused on the importance of prohibiting honoraria for high-ranking Government officials, especially members of Congress," and "[l]ittle attention was paid" to the question of lower-level governmental employees. *Id.* at 3-4. Thus, the "impact of the honoraria ban on rank-and-file employees [only] became apparent late [in 1990], prompting the legislative effort to modify it." *Id.* at 4.

Contemporaneous with the legislative efforts to amend the Reform Act to remove the flat ban on employee honoraria, Congress began considering its annual appropriations bill which, *inter alia*, set salaries for members of Congress. That bill, which was enacted into law as the Legislative Appropriations Act of 1991 ("Appropriations Act"), Pub. L. No. 102-90, 105 Stat. 447 (1991), provided for an increase in senators' pay, in "exchange" for which the Senate agreed to subject itself to the limitations on honoraria and outside income incorporated in the Ethics Act of 1989. *See* Pub. L. No. 102-90, Title I, Title III § 6(b) (2), 105 Stat. 447 (1991). Accordingly, the appropriations bill that passed the Senate made a number of appropriate "technical" amendments to the Ethics Reform Act. *See* 137 Cong.Rec. S10,267 (daily ed.

[2] A virtually identical bill, H.R. 3341, was originally introduced in the House as H.R. 325 on January 3, 1991. *See* H.R. Rep. No. 385, 102d Cong., 1st Sess. 7 (1991).

July 17, 1991). None of those amendments would have affected the definition of "honorarium."

Less than two weeks after passage of the Senate and House bills, the conference committee appointed to resolve differences between the bills submitted its report for approval by the House and Senate. *See* H.R. Conf.Rep. No. 176, 102d Cong., 1st Sess. (1991). The report included—and it is the first reference to the concept—an amendment modifying the definition of the term "honorarium" in the Ethics Reform Act. The following words were added to section 505(3): "(including a series of appearances, speeches, or articles, *if* the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government)" emphasis added). *See id.* at 5. The appropriations bill, including this language, passed the House on a voice vote with little debate. *See* 137 Cong.Rec. H6149, 6159 (daily ed. July 31, 1991). Although debate in the Senate was spirited, discussion focused largely on the question of the senators' pay raise. *See* 137 Cong.Rec. S11986-11989 (daily ed. Aug. 2, 1991). Neither House addressed the rationale for amending the honorarium language. The only direct indication of the conference committee's purpose in adding this rider is the following sentence in the committee report: "Subsection (b) amends the definition of 'honorarium' to *include* payment for a 'series of appearances, speeches, or articles,' if the subject matter is related to the individual's duties or payment is made because of the individual's status with the Government, rather than only payment for a single event." *See* H.R. Conf.Rep. No. 176, at 12 (emphasis added). The report thus implies that by amending the Reform Act Congress sought to treat a "series" of lectures in the *same manner* as a single lecture for purposes of the honorarium ban. This amendment (the "Appropriations Rider") became effective on January 1, 1992, and the Office of Government Ethics implemented new

regulations incorporating the new honorarium definition on January 8, 1992. *See* 57 Fed. Reg. 601 (1992).

The definition of "honorarium," as amended, now reads:

> The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles *if* the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual. . . .

5 U.S.C. App. 7 § 505(3) (emphasis added).

Following passage of the Appropriations Act Rider, S. 242—which had once already passed the Senate unanimously and the purpose of which was to remove the flat ban on the receipt of honoraria by government employees—dropped off the legislative agenda.

These consolidated actions were first filed in the district court in December, 1990, even before the effective date of the Reform Act. The plaintiffs' affidavits, filed in the lower court actions, were all prepared prior to the act's amendment, at a time when the act provided for a flat ban on honoraria. The affidavits are therefore, to say the least, unhelpful in determining whether the affiants' conduct even falls within the amended ban.

Be that as it may, the lower court's judgment was issued in March, 1992—three months *after* the effective date of the 1991 Appropriations Rider. The district court opinion nevertheless quotes the prior and by-then repealed definition of "honorarium," and in so doing cites to the wrong version of the implementing regulations. *See NTEU v. USA*, Civ. Act. No. 90-2922, Mem. Op. at 4 (D.D.C. Mar. 19, 1992). The district court based its opinion that the act was unconstitutional on its

face on the grounds that it contained a complete *flat* ban on the receipt of honoraria by federal employees. The court never construed the *amended* statute to determine whether it too included such a ban (perhaps because it was not brought to the court's attention), nor did it decide whether the plaintiffs' conduct was proscribed by the amended statute. And as I have noted, the panel did not focus on this issue either.

B.

Federal courts are obliged to avoid constitutional issues if possible. Accordingly, "as bettween two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148. We followed that course only a few months ago, *see Association of Am. Physicians & Surgeons, Inc. v. Clinton*, No. 93-5086, slip op. at 14, 23-24 (D.C. Cir. June 22, 1993). To be sure, it does appear that both parties litigated the case on the assumption that the statute's amendment—limiting honoraria for a series of speeches *only if* the speeches implicate the duties or status of the government employee—was of no significance. It is certainly understandable, therefore, that the panel majority and the dissenting judge would not have focused on the possibility of a limiting construction of the statute. We need not, however, ignore the actual language of the statute in order to resolve the dispute the parties put before us. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 113 S.Ct. 2173, 2177-78 (1993) (" '[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law,' even where the proper construction is that a law does not govern because it is not in force" (citation omitted)). Indeed, we had previ-

ously recognized our particular obligation to consider an argument not precisely raised if to do so avoids a constitutional issue. *See Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987).

In striking the statute down, the majority repeatedly refers to the statute's so-called flat ban as evidence of its overbreadth. Yet, whatever else the statute as amended means, it certainly no longer creates such a "flat ban"—at least when the speech implicated takes the form of a "series." This is hardly insignificant. Of the parties suing in their individual capacities, it may well be that *none* are engaged, or planning to engage, in conduct prohibited by the amended statute. As to these parties, at least, the judgment below—which applied a by-then repealed statute—should be reversed and the cause remanded for an application of the amended statute to their conduct.[3]

But what I find even more troubling is that the panel decision does not consider the distinct—indeed highly probable—possibility that the 1991 Appropriations Rider contained a simple unintended mispunctuation. *Cf. National Bank of Oregon*, 113 S.Ct. at 2182-84 (holding that a statute's punctuattion may be disregarded where necessary to enforce congressional intent, and concluding that the quotation marks there at issue

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[3] Because the plaintiffs' affidavits were filed before the 1991 amendment was passed, those affidavits are often ambiguous as to whether or not the affiants in question were engaged in a "series" of lectures. Nevertheless, it seems relatively clear that at least some of the actions filed below no longer state a claim. To take but one example, the National Treasury Employees Union, suing on its own behalf, claims that it is injured by the fact that under the flat ban imposed by the old act it could not continue to pay a government employee to write its monthly newsletter. *See* Affidavit of Charles Giunta, J.A. at 79. Under the *amended* statute and the O.G.E. regulations, however, such an arrangement would clearly be permisssible as constituting a series of articles. *See* 5 C.F.R. § 2636.203(a) (13), example 6.

were misplaced).[4] It seems likely to me that Congress intended the parenthesis beginning with "or" to end *before* the clause beginning with "if," with the result that section 505, properly read, does not create a flat ban on the receiptt of honoraria by governmental employees *at all*—whether or not their speech took the form of a single address or a series.[5]

There would appear to be only two possible constructions of the statute. The first would read the statute, as amended, as retaining the flat ban on the receipt of honoraria by employees for single speeches, while removing such a ban for the delivery of a "series" of such speeches, so long as those speeches concern subjects unrelated to the officers' employment. The difficulty with this reading, aside from the fact that it strains logic to understand why anyone would seek to draw a distinction between compensation for a one-time speech and a "series" of speeches, is that there is simply no indication that Congress intended to draw that distinction, or that it felt a need to amend the Reform Act along *that* line when it acted in August, 1991. On the contrary, the sole sentence addressed to this amendment in the Conference Committee Report strongly suggests that Congress intended to amend the act in a way that

[4] That possibility is all the more likely given the limited time between the amendment's incorporation as a rider to the appropriations bill and that bill's passage, as well as the fact that Congress' focus was clearly on other matters: namely, the question of the senators' pay raise in the midst of a recession.

[5] In other words, the statute should read:

> The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles) if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual. . . .

would treat one time acts and a "series" of acts under the same doctrinal framework. Given this background and in light of the constitutional difficulties entailed, I doubt very much that we should insist on reading the statute in the literal manner required by its current punctuation—especially when the result is to create an apparent anomaly in meaning. No party even suggests that Congress intended a distinction between single speeches and a "series" of speeches.

The second possible reading, one that views the close parenthesis mark as simply misplaced, would read the amended definition as subjecting both single speeches and a "series" of such speeches to the same doctrinal proviso: that is, that honoraria for both *may* be accepted, so long as the speeches in question do not relate directly to the official's duties or status. Unlike the first reading, this construction is both logical and, far more important, consistent with the legislative history that reveals a strong contemporaneous desire in Congress to amend the Ethics Reform Act so as to *remove* the flat ban on lower-level governmental employees. After all, we do know that there was a strong and unopposed contemporaneous congressional desire to amend the honoraria ban in order to remove the flat ban that had then applied to governmental employees.

Judge Williams, in his concurrence to this order, maintains that my suggested alternative reading of the language is not linguistically permissible. "[I]t bears no resemblance to that of English." *See* Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [2]. But, surely if Congress had actually put the close of the parenthetical where I would place it, no one would have difficulty understanding the meaning of the passage. Judge Williams also suggests that because it "surely" would have been a losing defense for an employee to argue that the unamended ban prohibited only single speeches and not a series of such speeches in amending the act explicitly to include a "series," Congress must have intended to draw a

distinction between single speeches and a "series" of such speeches. *See* Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [3]. Apparently, that was not *Congress'* judgment. The report issued by the Senate committee that was studying proposed amendments to the Ethics Reform Act in April of 1991—only four months prior to the amendment in question—concluded otherwise.[6] Referring to the *unamended* version of the ban and in justification of its proposed amendments, the committee observed:

> Ironically, the [unamended] honorarium ban prohibits fees only for certain speaking and writing, while leaving undisturbed the ability of federal employees to earn outside income from a wide variety of other "moonlighting" activities. . . . *An employee can teach a full semester course on a particular subject, but cannot be paid for a single lecture on the same subject.*

S. Rep. No. 102-29, at 5 (emphasis added). The legislative history thus suggests that Congress itself *was* concerned with the potentially disparate treatment, to which the unamended act subjected single lectures and a "course" of lectures, and that it intended to *remove* that potential disparity. Congress' *inclusion*, then, of a "series" of lectures in its 1991 amendment, far from creating an inference that it sought to treat single speches and a series of such speeches differently, was apparently motivated by quite the opposite desire. In short, the 1991 amendment sought to accomplish two objectives simultaneously: it clarified that the honorarium ban reached single speeches and a "series" of speeches alike and limited the ban on *both* pursuant to a "status or subject matter" test. Unfortunately, as so often occurs when legislation is fashioned hurriedly, the draftsmen simply appear to have made a mistake.

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[6] This report was appended to NTEU's appellate brief.

In response to my point that it simply makes no sense for Congress to have wished to treat one speech differently than a series, Judge Williams heroically suggests a number of possible justifications for such a distinction. I find his hypothetical congressional logic quite unconvincing—indeed farfetched—but, more important, there is not the slightest indication that Congress ever entertained Judge Williams' hypothetical reasoning. No one, as far as I know, prior to Judge Williams' concurrence (certainly not the parties), has ever even suggested that Congress thought that the added effort to give a series of paid speeches—presumably two rather than one—is a deterrent to corruption. Perhaps only those who have not heard many politicians or bureaucrats speak, and are more used to academic lectures, would assume that those speeches would require *any* effort or would need significant freshening. And the notion that a government official who speaks for pay more than once (twice?) to a group is less likely to be corrupted than one who speaks for compensation only once because the latter's behavior is more noticeable to the "public" than the former is, in my view, down right fanciful.

Finally, the added administrative burden on Congress and the courts that Judge Williams' interpretation of the statute implies is staggering. How would the courts and Congress—as to whom the honorarium ban as written continues to apply—determine when speeches or a split article constitute a "series"?

The panel's decision is actually anchored to the strength of Judge Williams' subsequently expressed hypothetical appraisal of a congressional purpose in distinguishing between a series of speeches and single appearances. I find his explanation wholly unconvincing. But it certainly cannot be thought so powerful as to preclude the acceptability of my alternative construction. *See Blodgett v. Holden*, *supra*. Both a logical reading of the statute, as well as an examination of the legis-

lative history, suggest that section 505(3) can be construed as *not* banning the recepit of honoraria by governmental employees for speeches and writings unrelated to those employees' official duties or status. As so construed, the act clearly survives constitutional scrutiny. Judge Williams agrees that a statute that would ban governmental employees from profiting by speaking and writing on subjects directly related to their official duties, or where payment is related to the status of such officials, *would* be constitutional. *See* slip op. at 7. Under these circumstances, I should think that we would at least ask the parties to brief this issue before holding the Act unconstitutional.[7]

C.

Assuming, *arguendo*, that the statute should be read as

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[7] Given that the statute as amended might be viewed as ambiguous, it might also be thought that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), commands deference to the agency entrusted with the act's administration (Office of Government Ethics), and that OGE's regulations, which enforce the literal reading of the statute, regulations, which enforce the literal reading of the statute, control the day. (The panel opinion itself does not rely on the Office of Government Ethics' interpretation of the act.) It is settled, however, that *Chevron* deference is not due to a regulation which interprets an act of Congress in a manner that raises serious constitutional difficulties. *See Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-001 (1979). That principle survives *Rust v. Sullivan*. *See* 111 S.Ct. 1759, 1771 (1991) (affirming that principle but finding that the regulations there at issue did not raise sufficiently serious constitutional difficulty). In this case there can be no doubt that the regulations, implementing the literalistic reading of the statute, raise serious constitutional difficulties. Under these circumstances, I would not defer to the agency's views, and would instead construe the statute to enforce its logical meaning.

literally punctuated, I would agree with my colleagues that the statute is unconstitutional. I am tentatively of this view because, unlike the panel, I see the statute, *not* as *overly* broad, but as not broad enough; that is, by failing flatly to ban honoraria given in exchange for a series of speeches and addresses, Congress has undermined any asserted interest in a prophylactic flat ban on paid speeches. The court should rehear the case, whether or not it is thought that the constitutional issue might be avoided, because the panel's constitutional analysis misapplies Supreme Court precedent.

The framework for evaluating the constitutionality of regulations on governmental employee speech was set out for the first time by the Supreme Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Recognizing that "the State has interests as an employer in regulating the speech of its employees that differ *significantly* from those it possesses in connection with regulation of the speech of the citizenry in general," 391 U.S. at 568 (emphasis added), the Court articulated a fairly relaxed standard of review to govern such cases. Under the *Pickering* test, a court, in reviewing a restriction on governmental employee speech, must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Significantly, the governmental interest involved need not be compelling, or even substantial. Nor, as the Court has subsequently made clear, must the government demonstrate that its interest substantially outweighs the burden on speech created by the regulation in question. *See Connick v. Myers*, 461 U.S. 138, 150 (1983) (specifically rejecting the lower court's conclusion that the government had a "burden to 'clearly demonstrate' that the speech involved 'substantially interfered' with official responsibilities"). Under *Pickering* and its progeny, all

that is required is that the governmental interest involved outweigh—by some amount—the burden on speech imposed by its regulation.

In light of these precedents, had Congress actually enacted a flat ban on the receipt of honoraria by government employees, my tentative view, like Judge Sentelle in dissent, *see* slip op. at 24-29 (Sentelle, J., dissenting), is that such a ban would be constitutional. The panel terms the governmental interest in preventing corruption and the appearance of impropriety by government servants "strong," slip. op. at 7, but we have elsewhere suggested that "prevent[ing] the erosion of . . . public confidence in the integrity of [government employees]" amounts to a "compelling" governmental interest. *Keeffe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985). That is not all. Under the subject or status test, which the statute applies to a "series" of speeches—and the panel would apply as a matter of constitutional law to all speeches—it could be devilishly difficult to fashion implementing regulations and even more difficult to apply them in thousands of cases.[8] This administrative burden, in conjunction with the underlying goal sought to be attained, would seem to me sufficient to justify the imposition of a prophylactic ban on the receipt of honoraria by governmental employees. As the Supreme court unanimously cautioned in the course of reversing this court before, we should "[not] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982).

[8] For example, as an ex-ambassador to Yugoslavia, I have been asked to speak on events in that former country. If I did so for an honorarium, would it have anything to do with my present status as a judge? Would it depend on whether lawyers were part of the group that invited me, or whether they were in the audience?

Yet, having accepted precisely this burden for the entire government with regard to the delivery of a "series" of speeches, it seems to me that Congress itself has vitiated any asserted interest in a prophylactic ban on the receipt of honoraria for one-time speeches. This is not to suggest, however, that the statute in question fails constitutional scrutiny on the grounds that it is "underinclusive." Congress can seek to address the problem of corruption in a piece-meal fashion if it so chooses. It is to recognize, however, that the *extent* to which Congress has chosen to ban an activity will be relevant in assessing Congress' real interest in so doing.

Similarly, I regard overbreadth as a problem in the *Pickering* context only insofar as it affects the *Pickering* balance of the burden on speech created by the government action in question with the government interest sought to be furthered. Although a prior decision in this circuit held that a restriction on speech of government employees must be "narrowly drawn" to "restrict speech no more than is necessary" to further the relevant governmental interest, *see McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983), the Supreme Court itself has never held the absence of so-called "narrow tailoring" to constitute an independent ground for invalidating a regulation of government employee speech. The breadth, as well as the weight, of the governmental restriction is of course *relevant* to the *Pickering* analysis. When the government burdens substantially more speech than "required" by its asserted interest, then its asserted interest might not outweigh that greater burden. After all, the greater the burden on speech, *ceteris paribus*, the more the *Pickering* balance will point toward invalidation of the rule. The flat in the *McGehee* narrow tailoring analysis is that the concept of narrow tailoring grows out of the constitutional skepticism with which the Court regards government regulation of private speech. The government must do no more than what the Court or courts regard as "necessary". That is

simply not the appropriate attitude with which we review government attempts to control the speech of employees.

Although the panel opinion seems to rely heavily on the concept of narrow tailoring, Judge Williams, in his concurrence, describes it as only a "metaphor" for a balancing test not significantly different than *Pickering*'s. Some metaphor! As I understand the panel opinion, the entire ban on honoraria is unconstitutional so long as the court believes even one employee who should be permitted to speak for pay is not permitted. Consistent with this approach, the panel did not even carefully inquire into the situation of the very plaintiffs before it.[9] Although Judge Williams disavows *McGehee v. Casey, supra,* as implicitly disapproved by the Supreme Court in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), the panel seems to have followed it—in spades. The real difficulty with the panel's analysis, in my view, is that it totally disregards any potential administrative burdens on the government—Judge Williams describes these as "line-drawing problems," as if they were insignificant. *See* Opinion Concurring in the Denial of Rehearing *En Banc, supra,* at [6]. Yet, these administrative burdens are part of the government's legitimate interest which must be weighed in determining whether a prophylactic ban that may sweep broader than the court would wish is constitutionally permissible.

Thus, a proper analysis of the government's interest as an employer in the efficient running of the workplace—a need recognized in *Pickering* and its progeny as the basis for the relaxed review proper to such circumstances—must include its interest in minimizing enforcement and administrative costs. Even where a governmental regulation of employee speech extends to more situations than arguably "necessary" to further the government's primary interest, that regulation might

[9] *See supra* n.3.

still survive *Pickering* inquiry, especially when the burden of crafting—and then enforcing—a more limited ban is added to the "government interest" side of the *Pickering* balance. Precisely because "the State has interests as an employer in regulating the speech of its employees that differ *significantly* from those it possesses in connection with regulation of the speech of the citizenry in general," *Pickering,* 391 U.S. at 568 (emphasis added), the government is not required to shoulder the same degree of enforcement costs when regulating its workplace that it must when private speech is involved.

D.

Finally, as Judge Sentelle pointed out in dissent, the panel's choice of remedy is extremely troubling. All that is needed to cure the constitutional infirmity is to relieve the ban on compensation from single speeches whose subject does not relate to the employee's job and when the status of the employee is not implicated. That takes only a minor modification of the definition of honorarium—indeed, one I believe Congress affirmatively intended. *See supra* at 10-11. Instead, the panel strikes down the entire statute, as it applies to the executive branch, including even, inexplicably, the obviously constitutional ban on executive branch employees giving a series of speeches directly drawn from their own work or where their status is obviously implicated.[10]

Judge Williams' concurrence leaves me even more perplexed than before. He agrees that my construction of the statute (or my remedial approach), which applies a "status or subject matter" limitation to the honorarium ban, "transform[s] the statute into one of virtually undoubted constitutionality."

[10] The panel takes solace from executive branch *regulations* that might prohibit such—but Congress did not, and it is our task to apply legislation as much as possible.

See Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [1]. The amended act's ban on a series of appearances, which Judge Williams agrees includes precisely such a limitation, *must*, then, be constitutional. It seems to me, then, that the panel, by striking down even that ban, employed as its governing metaphor—rather than "narrow tailoring"—tossing out the constitutional baby with the arguably unconstitutional bath water.

The panel justifies its refashioning of the legislation to treat executive branch employees more favorably than employees of the other two branches by asserting that Congress would have wished to totally ban honoraria for legislative and judicial officers and employees because the subject matter before those two branches is so broad. But Congress explicitly concluded otherwise—at least with respect to a series of speeches. No distinction was drawn between the three branches, and although it may well be that a congressman's status is typically implicated when he or she gives a speech for money, it might not be true of judges. And there is certainly no reason to distinguish a mail room employee in the Treasury Department from a mail room employee in a federal court. The panel's remedy permits the former to lecture for money on, let us say, the Quaker religion, but assumes Congress would have wished to prohibit the latter from doing so—and, paradoxically, implies that it would be constitutional for Congress to ban all such speeches for judicial branch employees. *See* slip op. at 14.

When a court severs the constitutional portion of a statute—particularly in a statute lacking a severance clause—it should be careful to condemn only the parts it holds unconstitutional, and it should seek to adhere, as much as possible, to congressional intent. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Champlin Ref. Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Neither the panel opinion nor Judge Williams' concurrence explains why simply holding that a ban on single speeches and articles more extensive than that which applies to a series of speeches or articles is unconstitutional would not have been a less intrusive, "narrowly tailored," manner of exercising any constitutional infirmity. Here, Judge Williams' hypothetical rendition of congressional reasons for distinguishing between single speeches and a series, even if it were persuasive, just will not do. On the contrary, Judge Williams' view that Congress intended to draw a distinction between a "series" of speeches and a "single" speech, and that such a distinction is logical, makes the panel's result—which subjects both bans to the *same* remedy—particularly anomalous. As I noted above, when a court severs a portion of a statute it should seek to adhere to congressional intent. Judge Williams' view that Congress had good reason to treat a series differently from a "single" speech, along with the fact that Congress' ban as to a series is beyond doubt constitutional, should have led the panel (or the *en banc* court) to sustain at least that portion of the ban. In any event, the parties should be heard on this crucial question.

* * * * *

It may well be that neither the plaintiffs nor the government for their own respective tactical or political reasons had any incentive to focus this court's attention on the parenthetical clause that I believe should have guided the panel's opinion—or at least its remedy. But given the grave constitutional issues at stake, I think we should oblige the parties to explore the vast middle ground between their artificially extreme positions. My colleague objects to rushing into an *en banc* for this purpose, but I would have thought hastening to declare an act of Congress unconstitutional was the greater judicial imprudence. I would actually prefer that the panel initially explore the issues aired in my and Judge Williams' opinions, but I would rather have an *en banc* rehearing to none at all.

APPENDIX E

TITLE V—GOVERNMENT-WIDE LIMITATIONS ON OUTSIDE EARNED INCOME AND EMPLOYMENT

§ 501. Outside earned income limitation

(a) OUTSIDE EARNED INCOME LIMITATION.—

(1) Except as provided by paragraph (2), a Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such calendar year.

(2) In the case of any individual who during a calendar year becomes a Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule such individual may not have outside earned income attributable to the portion of that calendar which occurs after such individual becomes a Member or such an officer or employee which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January

1 of such calendar year multiplied by a fraction the numerator of which is the number of days such individual is a Member or such officer or employee during such calendar year and the denominator of which is 365.

(b) HONORARIA PROHIBITION.—An individual may not receive any honorarium while that individual is a Member, officer or employee.

(c) TREATMENT OF CHARITABLE CONTRIBUTIONS.—Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed $2,000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

(Pub. L. 95-521, title V, § 501, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1760, amended Pub. L. 101-280, § 7(a), May 4, 1990, 104 Stat. 161; Pub. L. 102-378, § 4(b)(1), (2), Oct. 2, 1992, 106 Stat. 1357.)

§ 502. Limitations on outside employment

(a) LIMITATIONS.—A Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule shall not—

(1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

(5) receive compensation for teaching, without the prior notification and approval of the appropriate entity referred to in section 503.

(b) TEACHING COMPENSATION OF JUSTICES AND JUDGES RETIRED FROM REGULAR ACTIVE SERVICE.—For purposes of the limitation under section 501(a), any compensation for teaching approved under subsection (a)(5) of this section shall not be treated as outside earned income—

(1) when received by a justice of the United States retired from regular active service under section 371(b) of title 28, United States Code;

(2) when received by a judge of the United States retired from regular active service under section 371(b) of title 28, United States Code, for teaching performed during any calendar year for which such judge has met the requirements of subsection (f) of section 371 of title 28, United States Code, as certified in accordance with such subsection; or

(3) when received by a justice or judge of the United States retired from regular active service under section 372(a) of title 28, United States Code.

(Pub. L. 95-521, title V, § 502, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, amended Pub. L. 101-280, § 7(a)(1), (b), May 4, 1990, 104 Stat. 161; Pub. L. 101-650, title III, § 319, Dec. 1, 1990, 104 Stat. 5117; Pub. L.

102-198, § 6, Dec. 9, 1991, 105 Stat. 1624; Pub. L. 102-378, § 4(b)(3), Oct. 2, 1992, 106 Stat. 1357.)

§ 503. Administration

This title shall be subject to the rules and regulations of—

(1) and administered by—

(A) the Committee on Standards of Official Conduct of the House of Representatives, with respect to Members, officers, and employees of the House of Representatives; and

(B) in the case of Senators and legislative branch officers and employees other than those officers and employees specified in subparagraph (A), the committee to which reports filed by such officers and employees under title I are transmitted under such title, except that the authority of this section may be delegated by such committee with respect to such officers and employees;

(2) the Office of Government Ethics and administered by designated agency ethics officials with respect to officers and employees of the executive branch; and

(3) and administered by the Judicial Conference of the United States (or such other agency as it may designate) with respect to officers and employees of the judicial branch.

(Pub. L. 95-521, title V, § 503, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, amended Pub. L. 101-280, § 7(c), May 4, 1990, 104 Stat. 161; Pub. L. 102-90, title I, § 6(b)(1), Aug. 14, 1991, 105 Stat. 450.)

§ 504. Civil Penalties

(a) CIVIL ACTION.—The Attorney General may bring a civil action in any appropriate United States district court

against any individual who violates any provision of section 501 or 502. The court in which such action is brought may assess against such individual a civil penalty of not more than $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater.

(b) ADVISORY OPINIONS.—Any entity described in section 503 may render advisory opinions interpreting this title, in writing, to individuals covered by this title. Any individual to whom such an advisory opinion is rendered and any other individual covered by this title who is involved in a fact situation which is indistinguishable in all material aspects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction under subsection (a).

(Pub. L. 95-521, title V, § 504, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761.)

§ 505. Definitions

For purposes of this title:

(1) The term "Member" means a Senator in, a Representative in, or a Delegate or Resident Commissioner to, the Congress.

(2) The term "officer or employee" means any officer or employee of the Government except any special Government employee (as defined in section 202 of title 18, United States Code).

(3) The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made be-

cause of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.

(4) The term "travel expenses" means, with respect to a Member, officer or employee, or a relative of any such individual, the cost of transportation, and the cost of lodging and meals while away from his or her residence or principal place of employment.

(5) The term "charitable organization" means an organization described in section 170(c) of the Internal Revenue Code of 1986 [26 U.S.C. 170(c)].

(Pub. L. 95-521, title V, § 505, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, amended Pub. L. 102-90, title I, § 6(b)(2), (3), title III, § 314(b), Aug. 14, 1991, 105 Stat. 450, 469.)

PART 2636—LIMITATIONS ON OUTSIDE EMPLOYMENT AND PROHIBITION OF HONORARIA; CONFIDENTIAL REPORTING OF PAYMENTS TO CHARITIES IN LIEU OF HONORARIA

Subpart A—General Provisions

Subpart B—The Honorarium Prohibition; Confidential Reporting of Payments to Charities in Lieu of Honoraria

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978, sections 102(a)(1)(A), 402, 404 and 501-505); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 56 FR 1723, Jan. 17, 1991, unless otherwise noted.

Subpart A—General Provisions

§ 2636.101 Purpose.

This part is issued under authority contained in titles II and VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended), amending the Ethics in Government Act of 1978, and contains regulations that implement the following:

(a) The prohibition at 5 U.S.C. app. 501(b) against receipt of honoraria and the provisions of 5 U.S.C. app. 501(c) whereby payments may be made to charitable organizations in lieu of honoraria;

(b) The confidential reporting requirement at 5 U.S.C. app. 102(a)(1)(A) applicable to payments made to charitable organizations in lieu of honoraria; and

(c). The 15 percent outside earned income limitation at 5 U.S.C. app. 501(a) and the limitations at 5 U.S.C. app. 502 on outside employment and affiliation applicable to certain non-career employees.

§ 2636.102 Definitions.

The definitions listed below are of general applicability to this part. Additional definitions of narrower applicability appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency ethics official* refers to the designated agency ethics official and to any deputy ethics official described in § 2638.204 of this subchapter to whom authority to issue advisory opinions under § 2636.103 of this part or to receive and review reports of honoraria recipients under § 2636.204 of this part has been delegated by the designated agency ethics official.

(b) *Designated agency ethics official* refers to the official described in § 2638.201 of this subchapter.

(c) *Employee* means any officer or employee of the executive branch, other than a special Government employee as defined in 18 U.S.C. 202. It includes officers but not enlisted members of the uniformed services as defined in 5 U.S.C. 2101(3). It does not include the President or Vice President.

(d) *Executive branch* includes each executive agency as defined in 5 U.S.C. 105 and any other entity or administrative

unit in the executive branch. However, it does not include any agency that is defined by 5 U.S.C. app. 109(11) as within the legislative branch.

(e) The terms *he, his,* and *him* include "she," "hers" and "her."

§ 2636.103 Advisory opinions.

(a) *Request for an advisory opinion.* (1) An employee may request an advisory opinion from an agency ethics official as to whether specific conduct which has not yet occured would violate any provision contained in this part.

(2) An advisory opinion may not be obtained for the purpose of establishing:

(i) Whether a particular entity qualifies as a charitable organization to which an honorarium may be paid pursuant to § 2636.204 of this part; or

(ii) Whether a noncareer employee who is subject to the restrictions in subpart C of this part may receive compensation for teaching. An advisory opinion issued under this section may not be substituted for the advance written approval required by § 2636.307 of this part.

(3) The employee's request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the employee that is relevant to the inquiry. Where, in the opinion of the agency ethics official, complete information has not been provided, that official may request the employee to furnish additional information necessary to issue an opinion.

(b) *Issuance of advisory opinion.* As soon as practicable after receipt of all necessary information, the agency ethics official shall issue a written opinion as to whether the conduct in issue would violate any provision contained in this part. Where conduct which would not violate this part would violate another statute relating to conflicts of interest or applicable standards of conduct, the advisory opinion shall so state and shall caution the employee against engaging in the conduct.

(1) For the purpose of issuing an advisory opinion, the agency ethics official may request additional information from agency sources, including the requesting employee's supervisor, and may rely upon the accuracy of information furnished by the requester or any agency source unless he has reason to believe that the information is fraudulent, misleading or otherwise incorrect.

(2) A copy of the request and advisory opinion shall be retained for a period of 6 years.

(c) *Good faith reliance on an advisory opinion.* An employee who engages in conduct in good faith reliance upon an advisory opinion issued to him under this section shall not be subject to civil or disciplinary action for having violated this part. Where an employee engages in conduct in good faith reliance upon an advisory opinion issued by an ethics official of his agency to another, neither the Office of Government Ethics nor the employing agency shall initiate civil or disciplinary action under this part for conduct that is indistinguishable in all material aspects from the conduct described in the advisory opinion. However, an advisory opinion issued under this section shall not insulate the employee from other civil or disciplinary action if his conduct violates any other laws, rule, regulation or lawful management policy or directive. Where an employee has actual knowledge or reason to believe that the opinion is based on fraudulent, misleading, or otherwise incorrect information, the employee's reliance on the opinion will not be deemed to be in good faith.

(d) *Revision of an ethics opinion.* Nothing in this section prohibits an agency ethics official from revising an ethics opinion on a prospective basis where he determines that the

ethics opinion previously issued is incorrect, either as a matter of law or because it is based on erroneous information.

§ 2636.104 Civil, disciplinary and other action.

(a) *Civil action.* Except when the employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an employee who accepts an honorarium or engages in any other conduct in violation of the prohibitions, limitations and restrictions contained in this part may be subject to civil action under 5 U.S.C. app. 504(a) and a civil penalty of not more than $10,000 or the amount of compensation the individual received for the prohibited conduct, whichever is greater. Knowing and willful failure to file the report required by § 2636.205 of this part or falsification of information thereon may subject an employee to a civil penalty of not more than $10,000 under 5 U.S.C. app. 104(a).

(b) *Disciplinary and corrective action.* An agency may initiate disciplinary or corrective action against an employee who violates any provision of this part, which may be in addition to any civil penalty prescribed by law. When an employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an agency may not initiate disciplinary or corrective action for violation of this part. Disciplinary action includes reprimand, suspension, demotion and removal. Corrective action includes any action necessary to remedy a past violation of this part, including but not limited to restitution or termination of an activity. It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, the Director of the Office of Government Ethics may order corrective action or recommend disciplinary action under the procedures at part 2638 of this subchapter. The imposition of disciplinary action is at the discretion of the employing agency.

(c) *Late Filing Fee.* An employee may be assessed a late filing fee of $200 under 5 U.S.C. app. 104(d) for any report of payments to charitable organizations in lieu of honoraria required by § 2636.205 of this part that is filed more than 30 days after the date the report is due.

(d) *Criminal penalties.* An employee who knowingly and willfully falsifies information on a report of payments to charitable organizations in lieu of honoraria required by § 2636.205 of this part may be subject to criminal prosecution and sentencing under 18 U.S.C. 1001 and 3571.

Subpart B—The Honorarium Prohibition; Confidential Reporting of Payments to Charities in Lieu of Honoraria

§ 2636.201 General standard.

An individual may not receive any honorarium while that individual is an employee.

§ 2636.202 Relationship to other laws and regulations.

The honorarium prohibition described in this subpart is in addition to any restriction on appearances, speaking or writing or the receipt of compensation therefor to which an employee is subject under applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interests. Even though compensation for an activity is not prohibited by this subpart, an employee should accept compensation, including travel expenses, or engage in the activity for which compensation is offered, only after determining that it is not prohibited by the following:

(a) An employee is prohibited by criminal statute and by the standards of conduct at part 735 of this title and agency implementing regulations from accepting compensation for an appearance or speech made or an article written in his official capacity or as part of his official duties. Unless specifically

authorized by a statute, such as 5 U.S.C. 4111, 5 U.S.C. 7342, or 31 U.S.C. 1353, this prohibition applies to the acceptance of travel expenses paid other than by the United States Government.

(b) An employee is prohibited by the standards of conduct from receiving compensation, including travel expenses, for speaking or writing on subject matter that focuses specifically on his official duties or on the responsibilities, policies and programs of his employing agency.

(c) As described in subpart C of this part, certain noncareer employees are subject to limitations on their receipt of outside earned income and may not engage in compensated teaching activities without advance approval under § 2636.307 of that subpart.

§ 2636.203 Definitions.

For purposes of this subpart:

(a) *Honorarium* means a payment of money or anything of value for an appearance, speech or article. The term does not include:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Meals or other incidents of attendance, such as waiver of attendance fees or course materials furnished as part of the event at which an appearance or speech is made;

(3) Copies of publication containing articles, reprints of articles, tapes of appearances or speeches, and similar items that provide a record of the appearance, speech or article;

(4) Actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing or publication of an article. Such travel expenses, when paid, reimbursed or provided in kind by an-

other, shall not be counted as part of an honorarium. Where such expenses are not paid or reimbursed, the amount of an honorarium shall be determined by subtracting the actual and necessary travel expenses incurred in connection with the appearance or speech or the writing or publication of the article;

(5) Actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, when paid or reimbursed by another;

(6) Compensation for goods or services other than appearing, speaking or writing, even though making an appearance or speech or writing an article may be an incidental task associated with provisions of the goods or services;

(7) Salary, wages and other compensation pursuant to an employer's usual employee compensation plan when paid by the employer for services on a continuing basis that involve appearing, speaking or writing. For these purposes, the term "employment" refers to services rendered in the context of an employer-employee relationship. It does not include any arrangement entered into by the employee or another as an independent contractor or with an agent, speakers bureau or similar entity that facilitates appearances or speaking or writing opportunities;

(8) Compensation for teaching a course involving multiple presentations by the employee offered as part of a program of education or training sponsored and funded by the Federal government or by a state or local government;

(9) Compensation for teaching a course involving multiple presentations by the employee offered as part of the regularly established curriculum of an institution of higher education as defined at 20 U.S.C. 1141(a);

(10) An award for artistic, literary or oratorical achievement made on a competitive basis under established criteria;

(11) Witness fees credited under 5 U.S.C. 5515 against compensation payable by the United States; or

(12) Compensation received for any appearance or speech made or article accepted for publication prior to January 1, 1991, or for any appearance or speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991.

(13) Payment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government.

Example 1. An employee of the Department of Agriculture has entered into a contract to develop a complex software package for a private company. The contract, which is for a single fee for all work to be provided under the contract, requires the employee to provide 2 hours of oral instruction on use of the program. He may accept the entire fee for performance under the contract. No part of the fee is an honorarium since the 2 hours of instruction is only incidental to his development and delivery of the software package. He could not, however, receive a fee specifically for 2 hours of oral instruction on the use of a program he had earlier provided under a contract that required only his development of a program.

Example 2. A management trainee employed by the Bureau of Indian Affairs is employed two nights a week as a reporter on a local newspaper. He may receive a salary for his continuing employmen: even though it is in a profession characterized by the writing of articles. He may not, however, accept compensation for newspaper or magazine articles written on a freelance basis or pursuant to a contract to furnish 5 articles over a one year period.

Example 3. An economist employed by the Department of the Treasury has entered into an agreement with a speakers

bureau to give 10 unrelated after-dinner speeches to be arranged by the speakers bureau with various organizations over a six-month period. The employee may not receive the contract fee of $10,000. The 10 speeches do not constitute a series of speeches, but 10 individual speeches.

Example 4. An attorney employed by the Department of the Air Force may not accept compensation for teaching a two-day seminar on Federal procurement law presented by a publishing company under the sponsorship of an accredited law school. He may, however, accept compensation for teaching procurement law as part of the law school's regular curriculum of courses.

Example 5. An air traffic controller employed by the Federal Aviation Administration has entered into a contract with a magazine publisher to write an article on sheep ranching in New Zealand. In addition to a fee of $500 for the article, the contract provides that the publisher will provide expenses for the employee to travel to New Zealand to conduct research on sheep ranching. The employee may accept the travel expenses, but not the $500 fee. In lieu of the $500 fee, he could not accept expenses to travel to and stay for a weekend in Sydney, Australia after the completion of his research.

Example 6. An employee of the National Aeronautics and Space Administration may accept compensation for a series of three articles on white collar crime she has agreed to write for a local newspaper. While she could not accept compensation for just two articles on white collar crime, she could accept a national journalism award for two articles she had written on an uncompensated basis.

Example 7. A physicist employed by the Department of Energy to conduct research on laser technology may not accept a contract fee for a series of three lectures on lasers where one of the lectures is to focus on the research he is conducting for DOE.

(b) *Appearance* means attendance at a public or private conference, convention, meeting, hearing, event or other gathering and the incidental conversation or remarks made at that time. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display.

Example 1. Because the fee is for an "appearance", an employee of the Securities and Exchange Commission who was responsible for a major securities fraud investigation may not accept a fee for standing in the reception line at the premier of a movie entitled "Junk Bond Scandal."

Example 2. A staff member of the National Security Council does not make an "appearance" by playing the piano and singing at a wedding reception and may accept a fee for his performance.

Example 3. An employee of the Forest Service does not make an "appearance" by modeling in a fashion show and may accept a modeling fee.

(c) *Speech* means an address, oration, or other form of oral presentation, whether made in person, recorded or broadcast. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of an *appearance* in paragraph (b) of this section. It does not include the conduct of worship services or religious ceremonies.

Example 1. An attorney employed by the Department of Justice may not receive a $50 honorarium for her informal talk to a local gardening club on how to design and grow a Victorian rose garden. Her talk, though informal, is a "speech."

Example 2. A nutritionist employed by the National Institutes of Health who is a stand-up comedian by avocation may accept a fee for performing a comedy routine at a dinner theater. His oral remarks do not constitute a speech because they are an incident of his performance using his talent as a comedian. He could not, however, accept compensation for a speech simply because he tells an introductory joke or otherwise amuses his audience.

Example 3. A statistician employed by the Department of Labor who is a lay minister may accept a gratuitous payment of $50 for performing a funeral service since it involves his conduct of a religious ceremony. However, he may not accept a payment for a talk on theology given to other ministers, for offering a prayer at the opening of a convention or for delivering a sermon during a worship service conducted by another minister. He could accept payment for his own conduct of worship services.

Example 4. A price analyst employed by the Defense Fuel Supply Agency may accept a fee of $100 for writing a speech to be delivered by another. The term "speech" includes only oral presentations and does not include writing a speech to be delivered by someone other than the employee. Moreover, the text of a speech is not an article.

Example 5. The stage portrayal of Hamlet by an employee of the Department of State does not involve the making of a "speech." He may be paid for his role in the Shakespearean production.

(d) *Article* means a writing, other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings. The term does not include works of fiction, poetry, lyrics, or script.

Example 1. An employee of the Office of Personnel Management who has reviewed a new book about the New York

Yankees may not accept a $50 honorarium from the publisher of a sports magazine. The book review is an "article."

Example 2. The lyrics and music for a college song written by two Department of the Navy attorneys does not constitute an "article." The attorneys could each accept a gratuitous payment of $50 if the song were selected by their alma mater for publication in its compendium of college songs.

Example 3. An engineer employed by the National Aeronautics and Space Administration has entered into a contract with an association of electrical component manufacturers to proofread and edit articles submitted by members of the association for publication in its monthly newsletter. The employee may accept the contract fee since the compensation is not for the writing of articles.

Example 4. An accountant employed by the Federal Deposit Insurance Corporation may accept compensation for writing a chapter of a textbook on corporate accounting. A chapter of a book is not an "article."

(e) *Receive* means that there is actual or constructive receipt of the honorarium by the employee so that the employee has a right to exercise dominion and control over the honorarium and direct its subsequent use. For purposes of this subpart, an honorarium is received while an employee if it is for an appearance or speech made or any article submitted for publication by that individual while he was an employee. Except when it is paid to a charitable organization in accordance with § 2636.204 of this subpart, an honorarium is received by an employee:

(1) If it is paid to another person on the basis of designation, recommendation or other specification by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Example 1. At the suggestion of the Army officer who authored an article selected for publication in a popular magazine, the publisher paid the amount of its usual honorarium to the officer's husband. The officer has "received" an honorarium.

Example 2. An employee of the Department of Housing and Urban Development has been offered a $500 honorarium for a speech to be given during the week before his scheduled date of retirement from Federal service. Since it is for a speech to be made while he is an employee, he will have "received" the offered honorarium while an employee even though actual payment may not occur until after his retirement.

(f) *Charitable organization* means an organization which is qualified with respect to deductible charitable contributions under 26 U.S.C. 170(c) because it is organized or operated exclusively for religious, charitable, scientific, literary, educational or another specified purpose. It includes, but is not limited to, an organization exempt from Federal taxation under the authority of 26 U.S.C. 501(c)(3).

(g) *Travel expenses* means the actual and necessary cost of transportation, lodging and meals incurred while away from the employee's residence or principal place of employment in connection with an appearance, speech or article. Where the lodgings and meals portion of travel expenses are paid or reimbursed by another in the form of a per diem or subsistence expense allowance, that allowance shall be treated as actual and necessary travel expenses if the allowance is no more than that customarily paid by the payor to its own officers or employees, provided the employee in fact incurs costs for commercial meals and lodgings on each day for which the allowance is received.

[56 FR 1723, Jan. 17, 1991, as amended at 57 FR 602, Jan. 8, 1992]

§ 2636.204 Payment to charitable organizations in lieu of honoraria.

(a) *Effect of payment to a charitable organization.* An honorarium which, but for this subpart, could be paid to an employee but is paid instead on behalf of the employee to a charitable organization is deemed not to be received by the employee. An employee may suggest that an honorarium that he is prohibited from receiving solely by application of this subpart be paid in his name to a charitable organization. An honorarium received and later donated to a charitable organization by the employee does not qualify as a payment to a charitable organization in lieu of an honorarium made in accordance with this section.

NOTE: An employee on whose behalf a payment in lieu of an honorarium has been made to a charitable organization may not take a tax deduction on account of the payment under any provision of the Internal Revenue Code or under any tax law of a State or political subdivision thereof.

(b) *Nonqualifying payments to charitable organizations.* No payment may be made to a charitable organization pursuant to this section:

(1) If the employee would be prohibited from receiving and retaining the honorarium by any conflict of interest statute or regulation or applicable standards of conduct other than this subpart. Honoraria that the employee is prohibited from receiving and retaining would include, for example, any honorarium that is for:

(i) An appearance or speech made or article written by the employee in an official capacity or as part of his official duties; or

(ii) A speech or article, the subject matter of which focuses specifically on agency responsibilities, policies or programs.

(2) In an amount in excess of $2,000 per appearance, speech, or article; or

(3) If the employee, the employee's parent, sibling, spouse, child, or dependent relative derives any direct financial benefit from the charitable organization that is separate from and beyond any general benefit conferred by the organization's activities.

Example 1. An Assistant U.S. Attorney who has successfully prosecuted an espionage case may not suggest that an honorarium offered for his speech about the prosecution be given to his law school. Because the topic of the speech relates to his official duties, he is prohibited from accepting any compensation by applicable standards of conduct. He could, however, suggest that an honorarium offered for his speech on training sheepdogs, be paid to his school.

Example 2. A personnel specialist employed by the Department of Labor whose spouse is employed by the Red Cross may not suggest that an honorarium for his speech about his vacation spent bicycling through China be donated in his name to the Red Cross.

Example 3. A claims examiner employed by the Department of Veterans Affairs whose mother suffers from Parkinson's Disease may suggest that an honorarium for her article on historic preservation be donated to a charitable organization that funds research seeking a cure for Parkinson's Disease. She may not suggest, however, that it be donated to a charitable organization that provides her mother with in-home nursing services.

§ 2636.205 Reporting payments to charitable organizations in lieu of honoraria.

(a) *Who must file.* A current or former employee, other than a new entrant, who is required to file a financial disclosure report, either on a confidential or public basis, shall at the

same time file a confidential report of payments to charitable organizations in lieu of honoraria if:

(1) Payments in lieu of honoraria aggregating more than $200 were made on his behalf by any one source to one or more charitable organizations during the reporting period covered by the financial disclosure statement; or

(2) In the case of an individual filing a termination report, there is an understanding between the reporting individual and any other person that payments in lieu of honoraria will be made on his behalf for an appearance or speech made or article submitted for publication while the individual was a Government employee which, together with any payments in lieu of honoraria made by that source during the reporting period, will aggregate more than $200.

This reporting requirement is in addition to any other requirement to disclose on a public or confidential financial disclosure report the source, date and amount of an honorarium paid to a charitable organization on the employee's behalf. It does not apply to any payment in lieu of an honorarium made to a charitable organization on behalf of the current or former employee's spouse or dependent child.

(b) *Where and when to file.* The report required by this section shall be filed with the agency ethics official by the date the current or former employee is required to file a confidential or public financial disclosure report. Any grant of an extension to file a financial disclosure report shall automatically extend the date for filing the report of payments to charitable organizations in lieu of honoraria and the agency ethics official may, for good cause shown by the employee, grant a separate extension of the date for filing the report required by this section. The total of all extensions for filing the report required by this section shall not exceed 90 days.

(c) *Reporting period.* The report of payments to charitable organizations in lieu of honoraria shall cover the same

period that applies to the confidential or public financial disclosure report the individual is required to file. For employees filing annual financial disclosure reports, the reporting period is the preceding calendar year or, if the employee commenced Government service during that year, the portion of the preceding calendar year beginning with the date the employee entered on duty. For those filing termination reports, the reporting period is the portion of the calendar year in which he terminated Government service up to the date of termination and, if he has not yet filed an annual financial disclosure report covering that period, the preceding calendar year or other period required for the annual report.

(d) *What to report.* Each report shall be filed on the standard form prescribed by the Office of Government Ethics and made available through the General Services Administration. Each report filed shall include the following information for each payment to a charitable organization in lieu of an honorarium, regardless of amount, made on the employee's behalf by any source from whom such payments made during the reporting period aggregate more than $200:

(1) The date of the payment (if payment has been made);

(2) The date of the appearance or speech for which the honorarium was paid or, where the honorarium is for an article, the date the article was submitted by the employee for publication;

(3) The name of the person or entity making the payment to the charitable organization;

(4) The name and the tax status of charitable purpose of the recipient;

(5) The subject matter of the speech or article or, where the honorarium is for an appearance, the reason for the appearance; and

(6) The amount of the payment;

An individual filing a termination report who is reporting with respect to payments which have not yet been made should write "Not Applicable" in the space provided for the date of payment and should provide the remainder of the information required on the basis of his best knowledge and belief as to payments which he understands will be made to charitable organizations on his behalf.

(e) *Effect of signing the form.* By signing the form the employee certifies that the information he has reported is true, complete and correct to the best of his knowledge and that neither he nor his parent, sibling, spouse, child or dependent relative receives from the recipient charitable organization a benefit that is separate and distinct from any general benefit conferred by the organization's activities.

(f) *Review of reports.* Within 60 days after receipt, the agency ethics official shall review each report of payments to charitable organizations in lieu of honoraria to determine that the reporting requirements of this section have been met and that each payment reported meets the standards at § 2636.204 of this subpart.

(1) The agency ethics official need not audit the report to ascertain whether the disclosures are correct; disclosures are to be taken at face value unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report.

(2) If the agency ethics official determines that the report is complete and that each payment is proper, he shall sign and date the report.

(3) If the agency ethics official determines that the form is not complete, he shall request that the employee complete the form by a specific date and annotate each addition or change with the employee's signature and the date the annotation was made. The 60 day period for review shall run from the date the completed form is filed.

(4) If the agency ethics official determines that additional information is needed to determine whether a payment to a charitable organization meets the standards at § 2636.204 of this subpart, he shall request that the employee furnish such information by a specific date and shall date and append to the report any information obtained in writing or annotate the report to reflect any information obtained other than in writing and the date it was furnished. The 60 day period for review shall run from the date the additional information is furnished.

(5) If the agency ethics official determines that the employee has failed to file a report or a complete report or has received an honorarium in violation of § 2636.201 of this subpart because a reported payment does not meet the standards at § 2636.204 of this subpart, he shall give the individual written notice of the deficiency and 10 days in which to submit a written response and, thereafter, shall refer the case for appropriate action as described in § 2636.104 of this subpart and annotate the report to reflect that referral.

(g) *Filing of reports with the Office of Government Ethics.* On August 15 of each year, the designated agency ethics official shall forward to the Office of Government Ethics all reports reviewed within his agency during the preceding one-year period.

(h) *Review of reports by the Office of Government Ethics.* Within 60 days after receiving the reports forwarded under paragraph (g) of this section, reports of payments to charitable organizations in lieu of honoraria filed by individuals whose public financial disclosure reports are required to be filed with the Director of the Office of Government [*sic*] shall be reviewed and signed by the Director.

(i) *Retention of reports.* Reports of payments to charitable organizations in lieu of honoraria shall be retained by the Office of Government Ethics for a period of 6 years. Unless needed in an ongoing investigation, the reports shall be destroyed after 6 years.

(j) *Confidentiality of reports.* Reports of payments to charitable organization in lieu of honoraria filed pursuant to this section are not available to members of the public and are to be treated with the confidentiality afforded confidential financial disclosure reports.

[56 FR 1723, Jan. 17, 1991, as amended at 56 FR 21589, May 10, 1991; 56 FR 51319, Oct. 11, 1991]

EFFECTIVE DATE NOTE: At 57 FR 5369, Feb. 14, 1992, the effective date of § 2636.205 was further deferred until the form to actually collect the information required under that section is approved by OMB.

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